

# Oversight **UNDERMINED**

*Investigation into the Ministry of the Attorney General's implementation of recommendations concerning reform of the Special Investigations Unit*



Ontario



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## **Ombudsman Report**

### **Investigation into the Ministry of the Attorney General's implementation of recommendations concerning reform of the Special Investigations Unit**

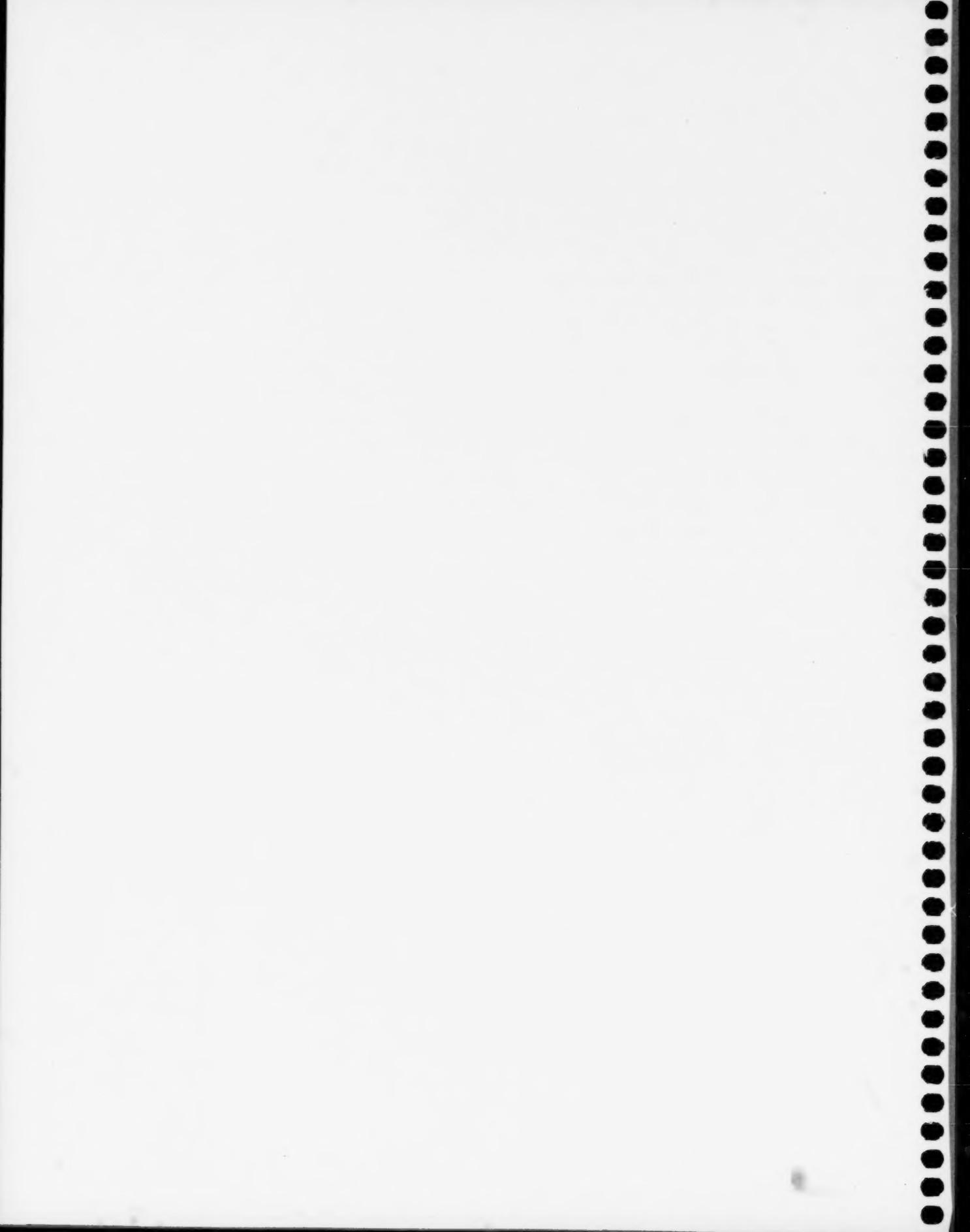
**“Oversight Undermined”**

**André Marin  
Ombudsman of Ontario  
December 2011**



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## **Executive Summary**

- 1 On June 22, 2009, 59-year-old Douglas Minty, a man with developmental disabilities who lived with his elderly mother in Elmvale, Ontario, was fatally shot by an OPP officer. Mr. Minty reportedly refused to obey police commands and charged at the officer with a knife. His death was followed, on June 24, 2009, by the shooting of 30-year-old Levi Schaeffer, at a remote campsite on Osnaburgh Lake. Mr. Schaeffer suffered from multiple psychiatric disorders. Like Mr. Minty, he too was shot and killed by an OPP officer when, armed with a knife, he approached an officer and failed to obey police commands to stop. These tragic cases represent only two of the 287 cases, 33 involving deaths, investigated by Ontario's Special Investigations Unit (SIU) in the fiscal year 2009-2010.
- 2 The SIU was created in 1990 to conduct criminal investigations into serious injuries and deaths of civilians resulting from police conduct. It had its genesis in a series of high-profile shootings by police that led to increasing community distrust. The SIU is a civilian agency, a model that is unique in Canada, and fosters public confidence in policing through independent and accountable oversight. Over the years, the SIU has not been without detractors. Community stakeholders have, at times, accused the SIU of being ineffective and of displaying a pro-police bias. On the other hand, the SIU has also come under fire from police officials, who have questioned its professionalism and charged that it operates with an anti-police animus. In the radically divisive world of police oversight, there will inevitably be tension and debate. However, historically, the SIU's job has been particularly challenging as a result of ingrained police resistance to its authority and the reluctance of successive governments to adopt measures that might be viewed as unpalatable by Ontario's policing community.
- 3 In September 2008, I issued my report, *Oversight Unseen*, on my investigation into the SIU's operational effectiveness and credibility, which was initiated after my Office received an increasing volume of complaints about the SIU. My report concluded that the SIU was plagued by serious problems that compromised its ability to carry out its mandate. I put forward 46 recommendations in my report. Twenty-five were addressed directly to the SIU to promote greater independence, rigour and integrity in its investigations, six focused on the need for the Ministry of the Attorney General, to which the SIU reports, to fully support the SIU in its independent

oversight role, and 15 called for the government of Ontario to clearly define, enhance and entrench the SIU's authority in new legislation.

- 4 After releasing my report, I continued to monitor the progress made by the SIU and the Ministry of the Attorney General, on its own behalf and that of the government of Ontario, in implementing my recommendations. While I found that the SIU had made concerted efforts to incorporate my recommendations and had gone a considerable distance to dispel its former image as a "toothless tiger," no concrete progress had been made with respect to key recommendations for legislative reform. Accordingly, on September 27, 2010, I launched an investigation into the Ministry of the Attorney General's implementation of my recommendations from *Oversight Unseen*.
- 5 During this investigation, I discovered that the Ministry had deliberately undermined the SIU in its attempts to comply with my recommendation that it ensure police co-operation through publicizing instances of police resistance. In an unprecedented move, the Ministry even pulled the plug on the SIU's annual report for 2008-2009, which contained commentary on the roadblocks to the SIU's effectiveness. The Ministry also dragged its heels on implementing my recommendation about notifying the Ministry of Community Safety and Correctional Services of systemic policing issues identified in SIU investigations. In addition, despite its assurance in September 2008 that it would immediately begin to consult the public about legislative change, I learned that in light of "vehement police opposition," the Ministry never planned to act on the statutory reforms I recommended.
- 6 In *Oversight Unseen*, I called on the government to clearly outline the SIU's mandate as well as police obligations during SIU investigations in new constituting legislation. I recommended a legislative prohibition on officers being represented by the same lawyer, a practice that compromised the reliability of their evidence and threatened the integrity of SIU investigations. I called for enforcement provisions that would provide real incentive for police officials to co-operate with the SIU, and I also recommended that the SIU process be made more transparent through the publication of director's reports and internal police reports relating to SIU investigations. However, instead of implementing these recommendations, which would have clarified the SIU's authority and provided it with a strong legislative foundation, the Ministry allowed the long-standing issues impeding the SIU to fester.
- 7 In the fall of 2009, open conflict emerged between the SIU and the policing community. The SIU publicly criticized the fact that in the Schaeffer case, counsel acting for multiple officers had reviewed and approved police notes

before they were provided to the SIU. Police stakeholders quickly moved to defend this practice and to condemn the SIU's comments in the media. In November 2009, the families of Douglas Minty and Levi Schaeffer applied to the courts, seeking declarations that counsel involvement in police note preparation and other questionable police practices in connection with SIU investigations contravened legislative requirements. The Ministry of the Attorney General attempted to put a lid on the burgeoning controversy. In December 2009, the Ministry quietly engaged the services of the Honourable Patrick LeSage to conduct a confidential consultation with police officials and the SIU, to explore the potential for resolving ongoing disputes through consensus. The Ministry recoiled from open debate on these issues, but they surfaced intermittently in the media, often as a result of the SIU issuing a press release in which concerns about police conduct affecting the integrity of an investigation were voiced.

- 8 Fifteen months after Mr. LeSage was retained, on April 7, 2011, the Ministry released the results of his efforts. In his review report, Mr. LeSage made a series of recommendations, including that a definition of "serious injuries" triggering the SIU's mandate be codified in the governing legislation, that witness officers not use the same counsel as officers under investigation by the SIU, that police notes be prepared before the end of an officer's tour of duty, and that it be clarified that officers cannot communicate directly or indirectly with other officers until the SIU has completed its investigations. Mr. LeSage also made observations regarding the proper role of the SIU in relation to internal police investigations arising from SIU cases, and the proper focus for SIU press releases. In addition, he called on the Ministry to revisit issues affecting the SIU and its relations with the police community in two years' time.
- 9 Then Attorney General Chris Bentley committed to implement Mr. LeSage's recommendations as soon as possible, and on August 1, 2011, an amending regulation incorporating three of these recommendations came into force. I believe that Mr. LeSage's work represents an important and very positive step forward.
- 10 As for the conflict over the role of lawyers in preparation of police notes, in a unanimous decision issued November 15, 2011, the Ontario Court of Appeal finally settled the question. In *Schaeffer*, the court clearly declared that lawyers are prohibited from vetting police notes or assisting in their preparation. This decision puts an end, at least for the time being, to a controversy that has poisoned relations between the policing community and the SIU for the past three years.

- 11 Despite the positive progress that has recently been made, based on the evidence I have amassed through two investigations, I continue to believe that there is a need for more comprehensive legislative reform to ensure enhanced accountability of police oversight.
- 12 In this report, I have concluded that the Ministry of the Attorney General's conduct, in failing to properly support the SIU in its efforts to implement my recommendations and in neglecting to take sufficient and timely steps towards implementing key recommendations from *Oversight Unseen*, was unreasonable. I have made 16 recommendations. I have recommended that the Ministry support the SIU and take all necessary steps to promote the adoption of the recommendations for legislative reform that I originally made in *Oversight Unseen* – subject to some amendments to take into consideration developments in this area since 2008. I have also asked the Ministry to provide my Office with regular six-month updates on its progress in implementing my recommendations. I have repeated my call for legislative reform, making 13 recommendations to the government of Ontario relating to a new legislative structure for the SIU.
- 13 Regrettably, the Ministry of the Attorney General has not responded to the specific recommendations I have made as a result of this investigation. Once again, I am left with the impression that the Ministry does not want to consider any reforms that would prove too distasteful to the policing community. It is content to adopt partial solutions and ride out the media storms. The citizens of Ontario are the losers in all this. The Ministry's stance frustrates the promise of strong and independent civilian police oversight, thereby undermining public trust in policing.
- 14 Too much time has already gone by with too little action. The SIU deals with hundreds of cases each year where civilians are seriously injured in incidents involving police; dozens where someone is killed. In the past three years, the SIU has identified problems with police co-operation in more than one-third of the cases formally investigated. This trend is deeply disturbing. It is long past due for the SIU to be provided with the necessary powers and authority to carry out its mandate effectively, credibly and transparently. The citizens of Ontario deserve a strong civilian oversight body capable of inspiring confidence.

## **Oversight Unseen**

- 15 In 1990, through the addition of a single section to the *Police Services Act*, the government of Ontario created the Special Investigations Unit. The SIU is unique in Canada.<sup>1</sup> It is the only fully civilian criminal investigative agency charged with the task of investigating circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. The SIU is an important accountability mechanism serving to reinforce public confidence in policing in this province. As the Honourable George Adams once said, it is a “bulwark of democracy.”
- 16 Unfortunately, from the outset the SIU faced two significant barriers to fulfillment of its mandate: Inadequate resources and strong police resistance to its oversight. Successive reviews of the SIU have called for reform. While the SIU’s funding has increased over time, and regulations have further delineated police and SIU roles and responsibilities, the SIU continues to be confronted by police challenges to its authority.
- 17 On June 7, 2007, I launched a systemic investigation into the SIU’s operational effectiveness and credibility. The investigation was initiated after I received complaints from affected individuals, family members, lawyers and community groups who raised concerns about the SIU’s independence and objectivity, as well as the thoroughness of its investigations. Concerns were also raised about the lack of information provided to involved parties.
- 18 In September 2008, I issued my report on my investigation, entitled *Oversight Unseen*. At that time, I identified a number of serious problems affecting the SIU, including endemic delays and a lack of rigour in SIU investigations, a reluctance to insist on police co-operation, and an internal culture overly influenced by a preponderance of ex-police officers among its staff. I was also very concerned that 18 years after its creation, the SIU’s mandate still lacked clarity and was not embedded in its own constituting legislation. Transparency was also missing in action, as SIU reports and significant policy issues remained hidden from public view.

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<sup>1</sup> At present, the SIU is the only fully civilian police oversight agency in Canada that conducts criminal investigations. However, on July 29, 2011, Bill 12, the *Police (Independent Investigations Office) Amendment Act, 2011*, came into effect in British Columbia, creating an oversight agency similar to the SIU. Recruitment for this agency was under way at the time of writing of this report. Former police officers can be employed as investigators by the Independent Investigations Office; however, former officers cannot be appointed if they were members of a police force in British Columbia at any time during the preceding five years.

- 19 I have monitored the progress of the SIU and the Ministry of the Attorney General in implementing the 46 recommendations I made in *Oversight Unseen*. Based on my review to date, I am satisfied that the SIU has made significant strides to reorient its operations and attempt to dispel its former image as “a toothless tiger.” While there continues to be room for further improvement, I believe that today the main impediment to the SIU’s success as an effective and credible oversight body continues to be the lack of a strong legislative foundation.
- 20 In September 2008, the Ministry of the Attorney General assured my Office that it was moving swiftly to address my concerns, saying it would speak to Ontarians about proposals for legislative change. Two years later, although the Ministry did implement some of my recommendations, it appeared that no concrete progress had been made toward legislative reform. Accordingly, on September 27, 2010, I launched this follow-up investigation of the Ministry of the Attorney General’s implementation of my recommendations
- 21 In December 2009, the Ministry of the Attorney General engaged the services of former justice Hon. Patrick LeSage, to review issues among various police organizations and the SIU, and to advise on potential resolutions. In carrying out this task Mr. LeSage was to explore the potential for consensus on such issues as, the SIU’s mandate, including the definition of “serious injury,” the conduct and duties of officers during SIU investigations, including the right to counsel and note-taking, chief’s investigations and reports relating to incidents investigated by the SIU, the purpose and content of the SIU press release at the conclusion of an investigation; and an ongoing process for resolving future issues between the SIU and police organizations. It is my understanding that Mr. LeSage had confidential discussions and met with police stakeholders, representatives of the SIU, and some community members on the SIU Director’s Resource Committee in the course of his review. On April 4, 2011, Mr. LeSage issued a brief report to the Attorney General, Chris Bentley, which was made public on April 7, 2011.
- 22 Mr. LeSage’s report contains a series of recommendations, including that his recommendations and other “SIU/Police related issues” be reviewed again in two years’ time.<sup>2</sup>

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<sup>2</sup> Mr. LeSage’s report is included at Appendix A to this report. All of the recommendations found in his report are relevant to my current investigation, with the exception of the recommendation found under the title **Attorney General Directive**, which focuses on an issue relating to the practice followed by Crown Attorneys.

- 23 Attorney General Bentley publicly committed to implementing Mr. LeSage's recommendations "as quickly as we can." An amending regulation, O. Reg. 283/11, incorporating three of these recommendations, came into force on August 1, 2011. Mr. LeSage's work has added value to the dialogue on the SIU and his recommendations reflect a few of the themes I explored in *Oversight Unseen*. However, building on the LeSage recommendations, I believe there continue to be additional areas that require reform in order to enable the SIU to achieve its full potential and enhance public confidence in the system of police oversight in this province.

## Investigative Process

- 24 After *Oversight Unseen* was released in September 2008, the SIU and the Ministry of the Attorney General undertook to provide periodic updates on their progress in implementing my recommendations. After receiving the SIU's first progress report on March 31, 2009, in order to properly evaluate the steps taken by the SIU, the Special Ombudsman Response Team (SORT) obtained and reviewed relevant SIU records, including its case file intake forms from October 2008 to the end of June 2009 and communications relating to the SIU's memorandum of understanding with the Ministry. SORT staff also conducted interviews with a number of individuals, including the Director of the SIU, seven SIU staff members, the SIU's Executive Officer, and a community member of the SIU's Director's Resource Committee.
- 25 The Ministry of the Attorney General also provided its first progress report on March 31, 2009, and SORT continued to monitor its progress in implementing recommendations addressed to it as well as the government of Ontario. This process included obtaining and reviewing relevant Ministry documents, and interviewing the Assistant Deputy Attorney General, Social Justice Programs and Policy Division. A representative of the Ministry of Transportation was also interviewed in connection with my recommendation that the government of Ontario should consider granting the Special Investigation Unit's vehicles emergency status under the *Highway Traffic Act* (recommendation 45 from *Oversight Unseen*). Ultimately, the government concluded that because the SIU did not meet the criteria for "emergency first responder," its vehicles would not qualify for emergency designation under that Act.

- 26** SORT investigators continued to request and receive relevant documents from the SIU, including electronic communications, director's reports, external correspondence, the unpublished annual report for 2008-2009, and materials related to litigation.
- 27** On September 20, 2009, the Ministry sent a second progress update, in which it suggested that it had concluded its obligation to provide status reports to my Office. However, we continued to gather information concerning implementation of the recommendations contained in *Oversight Unseen*.
- 28** In September 2010, we wrote to the Ontario Association of Chiefs of Police (OACP), which has more than 1,500 members and represents RCMP, OPP, First Nations and municipal police services, and the Police Association of Ontario (PAO), which represents some 33,000 front-line officers, seeking their views on implementation of my recommendations for reform relating to the SIU. We did not receive a response from the OACP. However, the PAO replied with general criticism of my investigation, report and recommendations.
- 29** Concerned about the lack of progress made by the Ministry in implementing my recommendations, on September 27, 2010, I notified the Ministry of the Attorney General that I intended to investigate its implementation of my recommendations from *Oversight Unseen*. This investigation was assigned to the Special Ombudsman Response Team. A team of eight investigators worked under the direction of the Director of SORT and Manager of Investigations and with the assistance of senior counsel.
- 30** We obtained and reviewed more than 200 additional documents from the Ministry, as well as further documents from the SIU, including copies of 13 investigative files, its draft 2009-2010 annual report and correspondence between the SIU and chiefs of police, the commissioner of the OPP and police associations between October 18, 2008 and October 31, 2011. SORT investigators conducted formal interviews with three people whose injuries during the Toronto G20 summit in June 2010 were investigated by the SIU, as well as with the Director of the SIU and the Assistant Deputy Attorney General, Social Justice Programs and Policy Division. Altogether, we obtained and reviewed more than 1,000 documents.
- 31** The SIU was fully co-operative, collecting and forwarding relevant information while we monitored its progress and conducted our formal investigation. The Ministry co-operated in providing some of the documents we requested. However, it repeatedly declined to produce materials relating

to consultations it held with stakeholders in March 2009. The Ministry acknowledged that this information could not legally be withheld under the *Ombudsman Act*, but claimed that stakeholders had been told the sessions would be confidential and that disclosure to my Office would have a chilling effect on future consultations, potentially jeopardizing its “ability to receive candid input from the public on complex and sensitive policy issues.” In the end, I was able to obtain information about the consultations from other sources and was able to complete the investigation without compelling disclosure of the information in the Ministry’s possession. However, I continue to be concerned with the Ministry’s failure to comply with the disclosure requirements of the *Ombudsman Act*. The Ministry also declined to provide my Office with access to information about Mr. LeSage’s review. The Ministry asserted that Mr. LeSage was retained as its counsel and therefore, his work on behalf of the Ministry was subject to solicitor-client privilege and protected from disclosure under the *Ombudsman Act*.

## Time to Get Serious: Definition of “Serious Injuries”

- 32 The SIU’s investigative authority is triggered by death or “serious injuries” involving police officers.<sup>3</sup> Neither the *Police Services Act* nor its regulations defines what constitutes a serious injury. However, in 1991, the first Director of the SIU, the Honourable John Osler, developed what has become known as the “Osler definition” for determining whether an injury is serious enough to engage the SIU’s mandate. Since that time, the SIU has used the following definition to assess whether injuries come within its authority:

“Serious injuries” shall include those that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault.

“Serious injury” shall initially be presumed when the victim is admitted to hospital, suffers a fracture to a limb, rib or vertebrae or to the skull, suffers burns to a major portion of the body or loses any portion of the body or suffers loss of vision or hearing, or alleges sexual assault. Where a prolonged delay is likely before the seriousness of the injury can be

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<sup>3</sup> *Police Services Act*, R.S.O. 1990, c. P.15, s. 113(5) [*Police Services Act*].

assessed, the Unit should be notified so that it can monitor the situation and decide on the extent of its involvement.

- 33 In 1999, the Ontario Association of Chiefs of Police (OACP) issued a narrower definition that was adopted by some police services. This inevitably led to competing interpretations as to when the SIU was to be notified of non-fatal injuries.
- 34 By 2008, when I conducted my initial investigation into the SIU, SIU officials explained that it was their understanding that all police services in Ontario were applying the Osler definition as a guide for notifying the SIU of non-fatal incidents. However, based on the evidence obtained in that investigation, I concluded there continued to be uncertainty and inconsistency in police notification of the SIU and in the SIU's response to incidents owing to a lack of clarity around the definition of serious injuries. Consequently, I made the following recommendation:

**Recommendation 33**

**The Special Investigations Unit's mandate should be clearly outlined in its constituting legislation.**

- 35 In addition, I also recommended expansion of the Osler definition to capture other forms of injury of a serious nature:

**Recommendation 34**

**The Special Investigations Unit's constituting legislation should include a definition of serious injury that encompasses significant psychological injury, all gunshot wounds and serious soft tissue injuries.**

- 36 While we were monitoring the SIU's progress in implementing my recommendations, Ian Scott, the current Director of the SIU, advised us that he had learned after raising a notification issue with the Barrie Police Service that, contrary to the SIU's previous belief, there continued to be some police services applying the more restrictive OACP definition of "serious injuries" in deciding whether to notify the SIU. We also discovered that the Ontario Provincial Police had been using a condensed definition of "serious injuries," omitting the first paragraph of the Osler definition. Instead of police services notifying the SIU of incidents based on a common understanding of the injuries coming within its mandate, there were at least three different definitions operating within the province, leading to divergent notification practices.

- 37** In *Oversight Unseen*, I described a series of cases where police officials failed to notify or were late in notifying the SIU of incidents coming within its jurisdiction. The result was that the SIU's ability to conduct a thorough investigation was compromised by the passage of time. Time is of the essence in SIU investigations. It is important for SIU investigators to arrive at the scene as soon as possible before witnesses disappear and physical evidence is lost. In order for the SIU to effectively carry out its mandate, it needs to be notified of incidents coming within its authority immediately. In fact, that is the obligation imposed on police services by the regulations governing police co-operation with the SIU (s. 3, O.Reg. 267/10). But as long as doubt surrounds the circumstances activating the SIU's authority, police services will continue to delay or fail to notify the SIU of incidents. The lack of a definitive legislative statement on what a "serious injury" entails has for years frustrated the public interest in effective oversight of police in this province.
- 38** The SIU has authority over some **58** police services in Ontario. It is critical that police officials and the SIU operate with a clear and consistent understanding of the circumstances requiring notification of the SIU. The public interest is not well served if invocation of the SIU's jurisdiction is dependent on whether a particular police service applies the Osler definition or some other interpretative guide. I was pleased to see that Mr. LeSage came to a similar conclusion, recommending to the Ministry that the Osler definition of "serious injuries" be codified through legislation. I urge the Ministry to follow through on its commitment to legislatively entrench the definition of serious injuries as soon as possible. I also encourage the Ministry, when it revisits this area in the spring of 2013, as it undertook to do in response to Mr. LeSage's April 2011 recommendation, to consider whether it is appropriate to expand the definition to capture other significant injuries, as I previously recommended.

## Too Little, Too Late – Notification of the SIU

- 39** Late notification and failure to notify the SIU of incidents is a significant impediment to the SIU's ability to carry out its mandate effectively. From October 18, 2008 to October 31, 2011, there were at least **50** instances where police services failed to notify or were late in notifying the SIU of circumstances coming within its jurisdiction.

- 40** For instance, Director Scott only learned about a March 2009 incident involving the Toronto Police Service, in which a man was Tasered four times and sustained a complex fracture to his face, when he read about it in the newspaper. In another case involving the same service in November 2009, when paramedics arrived shortly after 11:45 p.m. at an incident scene, a man was found apparently unconscious with his head in a pool of blood. He was transported to hospital on a spine board. The Toronto Police Service promptly notified the Toronto Police Association and an association lawyer met with the officers early the next morning. However, it took the police more than nine hours to notify the SIU. In yet another case in December 2010, it took the intervention of the Office of the Independent Police Review Director to prompt the Toronto Police Service to notify the SIU of a serious injury sustained seven months earlier.
- 41** Astoundingly, the Niagara Regional Police Service failed to notify the SIU of an incident occurring on April 18, 2009, where an injured man was taken to hospital with septic poisoning after spending eight hours in a jail cell, and spent the next three weeks on life support. The Ontario Provincial Police waited three weeks to advise the SIU of a historical sexual assault disclosed in March 2009. On September 21, 2008, an OPP officer hit a man so hard that he fractured his own arm, as well as the man's nose. But it took the OPP two months to notify the SIU about the case.
- 42** On June 28, 2011, a Peel Regional Police dog bit Michelle Rosales while she was in a park with a friend, waiting for a midnight screening at a nearby theatre. The dog was with a search team looking for robbery suspects. The dog bit Ms. Rosales' arm and refused to let go, despite his handler's commands. The dog then bit Ms. Rosales a second time and again had to be commanded to release her. Although Ms. Rosales sustained two large lacerations that were significant enough to warrant calling an ambulance to the scene, the Peel Regional Police neglected to contact the SIU. The SIU only learned of the incident when Ms. Rosales' lawyer called eight days later. Director Scott observed that this deprived the SIU of a contemporaneous accounting of the incident.
- 43** Having a legislated definition of "serious injuries" should go a long way to ensuring more timely notification of the SIU. On April 14, following Mr. LeSage's recommendation, OPP Commissioner Chris Lewis directed that the OPP adopt the Osler definition of serious injuries. This is a positive step forward. Unfortunately, last year, the OPP took a step backwards where notification of the SIU was concerned.

- 44 The OPP, which accounts for about one-third of all incidents investigated by the SIU, unilaterally changed its notification practices last year, further hampering the SIU's efforts to carry out its oversight role.
- 45 On January 21 2010, the Ontario Provincial Police issued a memorandum to senior officers, adopting a "two-fold test" for notification of the SIU. This test requires OPP officers to first assess whether there are grounds to believe that an injury or death was caused by a criminal act on the part of police officers – before proceeding to notify the SIU. If, in the OPP's own opinion, there is no criminality, its officers are directed not to contact the SIU. The OPP memorandum gives two examples – where a person "falls and breaks a limb while running from police" or "self-injures in a cell where only a civilian guard is present."
- 46 Assessment of the criminality of events leading to death or serious injuries is at the heart of the SIU's mandate. In a letter dated February 5, 2010, Director Scott wrote to then Commissioner Julian Fantino, raising concerns about the new "two-fold" test and requesting that the OPP revisit its stance on notification of the SIU. He provided an example of an OPP case in which three people were seriously injured in a vehicle collision. The SIU was notified by another police service of the collision. In that case, the OPP took the position that the SIU should not have invoked its mandate because there had been no police pursuit of the vehicle. However, the SIU investigation later confirmed that the subject OPP officer had activated his emergency lights shortly before the vehicle left the roadway.<sup>4</sup> In reporting the results of the investigation to Commissioner Fantino, Director Scott commented on the failure of the OPP to notify his office:

Had an officer from the [other].... Police Service not notified the SIU, I take it that your service would have never notified the Unit. S 3 of O.Reg 673/98 clearly states in part that "a chief shall notify the SIU immediately of an incident involving one or more of his or her police officers ... [emphasis added]." Accordingly, your service ought to have notified the SIU immediately upon learning of one of your officers being involved in an incident in which serious injuries were involved.

- 47 In his February 5, 2010 letter, Director Scott emphasized that the application of the OPP's new notification test would inevitably lead to more situations where the SIU ought to be immediately notified, but would not be, and noted

<sup>4</sup> Regardless of whether or not there was a pursuit, the fact that there was police involvement and an injury meeting the "serious injury" threshold would be sufficient to render this incident within the SIU's mandate.

that it would result in the OPP prejudging the issue of the relationship between injuries and potential criminal liability.

- 48 The OPP's February 26, 2010 response to Director Scott was overtly dismissive. Commissioner Fantino declined to reconsider the OPP policy on the duty to notify the SIU, and criticized Director Scott's interpretation of the legislation as "a self-assumed, expanded SIU mandate not supported in law," resulting in "unnecessary notifications" and "needless hardship."
- 49 It is extremely unfortunate that the OPP has interposed an internal criminality assessment as a precondition to notifying the SIU. Allowing police to conduct their own preliminary review of incidents undermines the purpose of having an independent oversight body. The determination of criminality is central to the SIU's mandate, and the failure of the provincial police service to accede this point is deeply disturbing.
- 50 The progress that would be made by codifying the definition of "serious injuries" would be significantly diminished if debate continues about the respective roles of police services and the SIU in assessing criminality of incidents involving serious injuries and death. Once again, I believe my original recommendation to outline the SIU's mandate in legislation should be implemented. Legislative clarification of the SIU's jurisdiction should include express direction that it is the SIU's responsibility to determine the criminality of an incident. The administrative inconvenience and expense to police officials associated with having to notify the SIU and participate in its process should not be used to justify subverting the public interest in having an effective civilian oversight system.
- 51 Subsequent to my earlier investigation, additional issues have arisen that would also benefit from further legislative clarification of the SIU's mandate. The SIU's authority applies whenever serious injuries or death may have resulted from criminal offences committed by police officers.<sup>5</sup> Consistent with the plain wording of the legislation, the SIU has interpreted this to apply even if the serious injury or death involves another officer. While infrequent, the SIU has historically investigated a number of cases where only police officers have been injured. On July 6, 2009, an OPP officer who had been a passenger in a cruiser died in a collision with a tractor-trailer in Elgin County. While Director Scott concluded that there were no reasonable grounds to believe the officer who drove the vehicle had committed a criminal offence, police stakeholders were vocal in their objection to the

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<sup>5</sup> *Supra* note 3.

SIU's investigation of this incident. On January 21, 2010, the Police Association of Ontario wrote to the Attorney General to express a number of concerns about the SIU, including its position that it had the authority to investigate such circumstances. The SIU was also recently embroiled in litigation in which the Peel Regional Police Chief challenged its ability to investigate alleged historical sexual assaults committed by a police officer who had retired before the complaint was received.<sup>6</sup> The court confirmed the SIU's jurisdiction to investigate such incidents. However, in order to avoid investigative delay, disputes and costly and prolonged litigation, the SIU's investigative authority should be expressly set out in its governing legislation.

- 52 Another issue that has recently sparked considerable friction between the SIU and police stakeholders relates to the proper role of legal counsel for officers involved in SIU investigations. In its January 2010 submission to the Attorney General, the Police Association of Ontario condemned what it referred to as Director Scott's "Unwarranted Attacks on the Right to Counsel." This was also one of the issues considered by Mr. LeSage in his recent review.

## **Share and Share Alike: The Right to Counsel**

- 53 Officers involved in incidents under SIU investigation are classified as either "witness" officers or "subject" officers. Officers who appear to have inflicted the injuries in question are designated as subject officers. They are the focus of the criminal investigation conducted by the SIU. Consistent with their rights under the Canadian *Charter of Rights and Freedoms*, subject officers are not required to submit their notes to the SIU or compelled to meet with the SIU to give evidence. The *Police Services Act* regulations provide that every police officer, whether classified as a witness or subject officer, is entitled to consult with legal counsel and to have counsel present during SIU interviews (s.7, O.Reg. 267/10).
- 54 *Police Services Act* regulations also require that all officers involved in an incident are to be segregated from one another, and are to refrain from communicating until after the SIU has completed its interviews (s. 6 O.Reg. 267/10). The reason for these provisions is quite simple. They protect against contamination of witness evidence through sharing of information. The SIU needs to be confident that the account of events obtained from witness officers is based on their independent recollection and not influenced

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<sup>6</sup> *Metcalf v. Scott*, 2011 ONSC 1292. An appeal of this decision has been filed.

by unconscious or deliberate tailoring to match the evidence of other witnesses or to protect a fellow officer.

- 55 Given the expense associated with retaining counsel, police associations have historically retained one lawyer to represent multiple officers in an SIU investigation. The cost of legal representation is often publicly funded as a result of agreements entered into with police services.<sup>7</sup>
- 56 The practice of sharing lawyers raises concerns about improper sharing of information in cases involving the SIU. The *Law Society of Upper Canada Rules of Professional Conduct* provide that where a lawyer is employed by more than one client in a matter, no information received in connection with that matter can be treated as confidential as between those clients (Rule 2.04(6)). Accordingly, the potential exists for information to be transferred amongst officers using a common counsel, in contravention of the *Police Services Act* regulations. In his February 2003 review of the SIU, Mr. Adams expressed concern about joint representation of officers involved in SIU investigations, observing:

Given the ethical obligations of disclosure of a lawyer to his or her client, this practice can undermine the purpose of segregating the officers and clearly needs review.<sup>8</sup>

- 57 In *Oversight Unseen*, I reported that it was still common for the same legal counsel to represent multiple witness and even subject officers, and that these

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<sup>7</sup> Director Scott advised that the cost of legal representation is usually borne by municipal police services boards. Under section 50 of the *Police Services Act*, local police services boards and the Crown, in the case of the OPP, may negotiate collective agreements providing for indemnification of legal costs, except where members are found guilty of a criminal offence. For instance, according to sections of the collective agreement between the Toronto Police Services Board and the Toronto Police Association provided by the Board to Director Scott in November 2009, the Board is generally responsible for indemnifying the legal costs of one counsel for each subject officer and the costs of one counsel collectively for all officers identified as witness officers. In a January 2009 submission to the Ministry of the Attorney General from the OACP Special Investigations Unit Committee entitled “Comments on *Oversight Unseen Investigation into the Special Investigation Unit’s Operational Effectiveness and Credibility*,” it is noted with respect to recommendation 42 of *Oversight Unseen*: “It may, ... affect some police services that pay legal fees as per their working agreement.” Also see *Schaeffer v. Ontario (Provincial Police)*, [2010] O.J. No. 2770 (Ont. Sup. Ct.) (QL) (Factum of the Respondents, Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Jeffrey Seguin at para. 88).

<sup>8</sup> Ontario, *Review report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario by the Honourable George W. Adams, Q.C.* (Toronto: Ministry of the Attorney General, 2003) at 44.

officers routinely consult counsel in preparing their notes before they are submitted to the SIU. I echoed Mr. Adams' concerns about the practice of joint representation in these circumstances, and recommended:

**Recommendation 42**

**There should be a legislative prohibition against legal counsel representing police officers involved in the same incident under investigation by the Special Investigations Unit to ensure the integrity of its investigations is maintained.**

- 58 In June 2009, concerns about the practice of joint representation of officers involved in incidents under investigation by the SIU were raised in the context of two tragic cases. The first incident took place in Elmvale on the evening of June 22, 2009, when Douglas Minty, a 59-year-old developmentally disabled man, was shot dead by OPP Constable Graham Seguin. Constable Seguin had responded to a call regarding an altercation between a door-to-door salesman and Mr. Minty. Mr. Minty reportedly charged at Constable Seguin with a knife, leading the officer to fire five shots. The OPP waited for 23 minutes before notifying the SIU of the incident and only made contact after first notifying the Ontario Provincial Police Association and the OPP's media representative. Before the SIU arrived, an OPP sergeant had also listened to accounts from the two most material civilian witnesses, which she later recorded in her notes.
- 59 Following the incident, two OPP sergeants as well as other officers attended at the scene. One of the sergeants instructed officers not to make any further notes until they had spoken to legal counsel and reminded them that OPP procedure required completion of notebook entries before reporting off duty. The same lawyer acted for Constable Seguin, who was the designated subject officer, and several witness officers. At the end of the investigation, Director Scott determined that based on civilian witness accounts, Constable Seguin was justified in the use of lethal force. However, in an October 15, 2009 letter to then Commissioner Fantino, Director Scott raised concerns about late notification, the taking of witness statements when the SIU was the lead investigator, as well as the instructions given to officers to delay writing up their duty notes until they had consulted counsel. With respect to the issue of note preparation, Director Scott suggested that this conduct represented a *prima facie* breach of the regulatory requirements relating to segregation of and non-communication among officers. Commissioner Fantino did not respond.

- 60** Under the *Police Services Act* regulations, chiefs of police and the commissioner of the OPP are required to conduct a parallel investigation of incidents under SIU investigation, subject to the SIU's role as lead investigator, to address police policies, services and the conduct of officers (s.11 O.Reg. 267/10). The OPP's internal investigation into the Minty incident did not substantiate that there were any breaches of the regulatory requirements under the *Police Services Act*.<sup>9</sup> It concluded that the delay in notifying the SIU was unintentional and due to the gathering of "appropriate information about the shooting and relaying accurate information back to the SIU." As for witness statements, it found that the officer in question simply recorded information recounted by two traumatized civilian witnesses while she drove them to the police station. Finally, the investigation took no issue with the fact that all witness officers were instructed not to prepare their notes until they had spoken to legal counsel.
- 61** The second incident occurred on June 24, 2009, at Osnaburgh Lake, when Levi Schaeffer, 30, was shot and killed by OPP Constable Kris Wood at a remote campsite. Constable Wood and Acting Sergeant Mark Pullbrook had encountered Mr. Schaeffer while they were investigating a boat theft. Constable Wood reportedly fired his gun twice at Mr. Schaeffer, who was armed with a knife, when he continued to approach despite police commands. No one else was on the scene when the shooting took place.
- 62** A detective sergeant later instructed the officers not to speak to each other, to contact their legal counsel, and to delay making their notebook entries until they had consulted with counsel. The SIU was not notified of the case until three hours after the shooting. Both Constable Wood, the designated subject officer, and Acting Sergeant Pullbrook consulted the same legal counsel, provided that counsel with a draft version of their notes, and completed their notebook entries two days after the incident. The same lawyer also represented 10 additional witness officers who became involved after the shooting. Although he was not required to, Constable Wood did provide his duty entries to the SIU. However, both officers refused to provide the SIU with the draft version of their notes, which they had provided to their counsel, on the basis of solicitor-client privilege.
- 63** On September 25, 2009, the Director of the SIU reported to the Attorney General on the results of his investigation into Mr. Schaeffer's death. While

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<sup>9</sup> Normally, the results of internal police investigations conducted by chiefs of police and the commissioner of the OPP under section 11 of O. Reg. 267/10 are not disclosed publicly. In the *Minty* and *Schaeffer* cases, these documents were disclosed in a subsequent legal proceeding.

he found that there were no reasonable grounds to believe that Constable Wood had committed a criminal offence, he was concerned about the reliability of the information provided by Constable Wood and Acting Sergeant Pullbrook. He referred to the manner in which the officers' notes were prepared in consultation with their legal counsel:

This note writing process flies in the face of the two main indicators of independent recitation of the material events. The first drafts have been 'approved' by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook's interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no information base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.

- 64 In his September 28, 2009 press release relating to the SIU investigation into Mr. Schaeffer's death, the Director repeated his concerns about the process followed by the officers in preparing their notes, and its impact on the SIU investigation into the incident.
- 65 The OPP carried out two internal reviews relating to the Schaeffer incident. In a November 30, 2009 report, it was observed that while officers have a right to counsel, they are obligated to complete notes by the end of their shift unless otherwise authorized by their supervisor. In that report, various circumstances that might justify delay in completing notes were discussed, including psychological duress and physical injury. The report also clarified that while officers could be advised of their right to speak with counsel, they were not to be directed to consult with legal counsel prior to writing up their notes. No charges were initiated against any of the officers for the apparent breach of OPP policy. In a December 10, 2009 report, it was found that both of the officers in the Schaeffer case had failed to complete their duty notes by

the end of their shift as required by OPP policy, but that their refusal to provide the SIU with the draft notes they had reviewed with counsel was supported by a legal opinion obtained by the Police Association of Ontario, which concluded these documents were protected by solicitor-client privilege.

- 66 Police stakeholders challenged Director Scott's position that joint legal retainers are inappropriate in SIU situations and that counsel should not advise officers with respect to their note preparation. The Police Association of Ontario placed substantial reliance on a legal opinion it obtained on November 27, 2009, from Gavin McKenzie, former Treasurer of the Law Society of Upper Canada. Mr. McKenzie advised that officers could exercise their right to counsel before or while they were segregated, as well as prior to writing up their notes. He was also of the view that there was nothing objectionable about officers providing a written account to their lawyer before making their notebook entries, and he confirmed that such documents were protected by solicitor-client privilege. With respect to the issue of joint representation, in the absence of a conflict of interest, Mr. McKenzie did not see this practice as incompatible with the segregation and non-communication requirements under the *Police Services Act* regulations. He remarked:

Lawyers have a duty to uphold and abide by the law, and a duty not to participate in or encourage illegal conduct. Counsel for subject and witness officers accordingly have a duty not to undermine section 6 by disclosing to one police officer involved in the incident anything said to counsel by another officer about his or her involvement in the incident. (Law Society of Upper Canada rule 2.02(5), commentary to rule 4.01(1)).

- 67 Mr. McKenzie expressed the opinion that lawyers retained by multiple officers could meet their obligations under the Law Society rules and ensure compliance with the *Police Services Act* regulations by refraining from disclosing information acquired from one segregated officer to another until the SIU's interviews have been completed. He also submitted that in order to have a full, meaningful right to counsel, officers must be allowed to meet with and consult counsel before and while segregated. He even suggested that to deprive officers of counsel would be incompatible with the officer's entitlement to legal counsel under the regulations and, quite possibly, section 10(b) of the *Charter*, which provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

## Taking it to the Courts

- 68 On November 4, 2009, the Schaeffer and Minty families filed a court application against the officers involved in the two incidents, the Commissioner of the OPP, the Director of the SIU and the Crown as represented by the Ministry of Community Safety and Correctional Services. The applicants sought declarations relating to joint retainers of legal counsel, the preparation of police notes, police de-briefing of civilian witnesses, and delayed notification of the SIU, and requested judicial interpretation of relevant provisions of the *Police Services Act* and regulations, as well as the *Law Society of Upper Canada Rules of Professional Conduct*.
- 69 The Minty/Schaeffer litigation is somewhat unique in that Director Scott, a respondent in the proceedings, supported the application. Director Scott took the position that a police officer's legislated right to consult legal counsel does not extend to assisting the officer during the note-taking process, and that a claim of solicitor-client privilege over an officer's first draft of notes is incompatible with an officer's professional duty to make independent and contemporaneous notes. In addition, he maintained that an officer's right to consult counsel does not include a right to share lawyers with other officers and that such joint retainers can undermine the regulatory requirement that officers be segregated from each other and not communicate. Director Scott also asserted that debriefing civilian witnesses is inconsistent with the SIU's principal investigative role and priority over any police force in investigating the circumstances of injury or death. Finally, he submitted that delay in notifying the SIU goes against the regulatory requirement of immediate SIU notification of an incident that might reasonably engage its mandate. "Timely notification of the SIU is important in ensuring the integrity of investigations and the preservation of evidence," he noted.
- 70 Initially, lawyers from the Ministry of the Attorney General represented Director Scott in the Minty/Schaeffer litigation. However, on the eve of the first day of the hearing into the matter, Crown counsel withdrew and Director Scott retained external representation. Presumably, this last-minute switch related to the fact that Director Scott's position conflicted with that of the OPP and the Ministry of Community Safety and Correctional Services, which were also represented by Crown counsel.
- 71 The Police Association of Ontario and the Ontario Association of Chiefs of Police obtained intervener standing in the proceedings supporting the position that officers have the right to consult counsel in preparing their notes.

- 72** On June 23, 2010, Superior Court Justice Wailan Low issued her decision on the application in *Schaeffer v. Ontario (Provincial Police)*. In the course of her reasons she commented:

It has been the practice of police associations to permit, if not to encourage, joint retainers of legal counsel in the interest of economy. There is no express prohibition in the legislation and it appears that the existence of the appearance of opportunity for collusion is not a sufficient incentive to discontinue the practice.<sup>10</sup>

- 73** In the end, however, Justice Low did not reach any conclusions on the substantive issues raised by the applicants about joint representation of officers during SIU investigations. Instead, she found that the application was not “justiciable,” as there was no legal dispute between the parties and the applicants had neither the private nor public interest standing to bring the application. An appeal of the decision was filed, with six additional parties representing police and community interests gaining intervener status. The Ontario Court of Appeal heard the appeal in early September 2011, and issued its decision November 15, 2011.

- 74** In its unanimous decision, the Court of Appeal rejected the position that the Schaeffer and Minty families did not have public interest standing and found that the issues they raised were indeed justiciable. Justice Robert J. Sharpe, writing for the court, (Justices R.P. Armstrong J.A. and Paul Rouleau J.A. concurring) dismissed the suggestion by police respondents that the issues were rendered moot by Mr. LeSage’s report. He observed that while Mr. LeSage addressed the “double retainer” issue involving common retainers for subject and witness officers, counsel involvement in note preparation was still a live issue. Rather than send the case back to the lower court, he found it just for the appellate court to deal with the substance of the case:

The issues are questions of pure law and statutory interpretation. Given the history and highly contentious nature of the issues, returning this case to the Superior Court would almost certainly not end the matter. A further appeal to this court seems virtually inevitable.<sup>11</sup>

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<sup>10</sup> *Schaeffer v. Ontario (Provincial Police)*, [2010] O.J. No. 2770 at para. 49 (Ont. Sup. Ct.) (QL) [*Schaeffer, Trial*].

<sup>11</sup> *Schaeffer v. Ontario (Provincial Police)*, [2011] O. J. No. 5033 at para. 52 (Ont. C.A.) (QL); 2011 ONCA 716 [*Schaeffer, Court of Appeal*].

- 75** Justice Sharpe ultimately concluded that while police officers are entitled to basic legal advice about their rights and duties, they do not have a right to have a lawyer vet or assist them in preparing their notes. Justice Sharpe issued declarations consistent with his findings and awarded costs against the respondent officers fixed at \$100,000.
- 76** Prior to the appellate decision in *Schaeffer*, I had expressed the view to the Ministries of the Attorney General and Community Safety and Correctional Services that in the absence of an express right for witness officers, who are the only officers compelled to co-operate with the SIU, to have legal counsel, it was unclear whether they would be entitled to legal representation under the *Charter*. In the SIU context, I found it difficult to see how a witness officer, either while segregated or during an SIU interview, would experience suspension of his or her liberty sufficient to constitute “a significant physical or psychological restraint” triggering this *Charter* right.<sup>12</sup> The Court of Appeal confirmed that segregation of officers involved in an SIU investigation does not constitute arrest or detention. Justice Sharpe characterized the officers’ right to counsel in SIU investigations as an enhanced right not enjoyed by ordinary citizens in police investigations. He explained that without the right to counsel set out in the regulations, “police officers would enjoy no specific statutory right to consult counsel in connection with an SIU investigation.”<sup>13</sup> Justice Sharpe went on to suggest that the right to counsel reflects the officers’ statutory obligation to co-operate with the SIU.
- 77** In any event, as the regulations currently confer the right to legal counsel on both subject and witness officers, the real question remains how to balance the regulatory entitlement to counsel with the need to ensure that segregation and non-communication requirements are upheld, and that the integrity of the SIU’s investigative process is maintained.
- 78** One of the considerations I took into account when making my original recommendation in *Oversight Unseen* that officers should be represented by separate legal counsel was the negative public perception associated with the joint retainer practices during SIU investigations. When officers – particularly subject and witness officers – share the same lawyer, this may

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<sup>12</sup> See generally *R. v. Grant*, [2009] 2 S.C.R. 353 at para. 444 for a discussion of this right. Director Scott has also pointed out that the duty of witness officers to provide statements to the SIU relates to their obligations as employees. If a witness officer terminates his or her employment, the SIU loses any authority to compel a statement.

<sup>13</sup> *Schaeffer, Court of Appeal, supra* note 11 at para. 62.

give rise to legitimate speculation that the jointly represented officers will be encouraged to support each other's versions of events with the goal of proving their colleagues blameless. This is particularly true in the police context, where it has been suggested that the phenomenon described as the "blue wall of silence" deters officers from co-operating or being seen to co-operate in investigations of fellow officers, for fear of being ostracized by their peers.<sup>14</sup>

- 79 In his April 2011 report, Mr. LeSage recommended that the *Police Services Act* regulations be changed to provide that witness officers are not to be represented by the same legal counsel as subject officers.
- 80 Two of Mr. LeSage's recommendations, set out under the heading "Officer's Notes," also appear to address concerns that have arisen relating to joint retainer of counsel in SIU cases. Under this heading, Mr. LeSage recommended that the *Police Services Act* regulations be amended to emphasize that officers are not to communicate "directly or indirectly" with other officers involved in an incident until the SIU has completed its interviews. As well, he recommended that steps be taken to request that the Law Society of Upper Canada add the following clarification to its Commentaries to the Rules of Professional Conduct:

Lawyers representing more than one officer in an investigation by the Special Investigations Unit are reminded of their duty not to undermine section 6 of O.Reg 267/10 (Segregation of Officers) by disclosing to one police officer involved in the incident anything said to the lawyer by the other officer regarding his or her involvement in the incident.

- 81 Effective August 1, 2011, Mr. LeSage's recommendations about prohibiting witness officers from being represented by the same legal counsel as subject officers (and from communicating directly or indirectly with other involved officers) were incorporated into the regulations under the *Police Services Act* (O. Reg. 283/11 amending O. Reg. 267/10). Implementation of these recommendations will undoubtedly reduce the risk of deliberate or inadvertent contamination of officer evidence through having a common counsel. Eliminating the prospect of witness officers sharing the same counsel as the subjects of an SIU investigation should also contribute to increased public confidence in the SIU process. In addition, Mr. LeSage's

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<sup>14</sup> See Office of the Ontario Ombudsman, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (Ombudsman Report) A. Marin (Toronto: Ombudsman of Ontario, 2008) at para. 186, specifically footnote 59.

recommendations will go some way towards assuaging police stakeholders who claim that the cost of providing separate legal counsel for all officers involved in SIU incidents would be prohibitive, and that it would be impractical in many instances to retain separate counsel for multiple officers, particularly in remote areas.<sup>15</sup> Overall, Mr. LeSage's recommendations represent a significant improvement on the existing situation.

- 82** Unfortunately, the prospect of the same lawyer representing all of the witness officers involved in an incident still does not fully address concerns about the independence of witness officer evidence. When I originally recommended in *Oversight Unseen* that all officers obtain independent counsel, it was not my intent to suggest that legal counsel representing multiple officers would deliberately pursue a strategy of undermining the segregation and non-communication requirements. Rather, it stands to reason that in an SIU case, whenever information is communicated by an officer to a lawyer representing other officers, there is potential for that information to be transferred consciously or subconsciously to the other involved officers. The phrasing of legal counsel's advice, the language used to describe an event, person or thing, or the wording of a clarifying question might unwittingly reflect discussion with another officer and impact the recall or recording of events. Even if only witness officers share a common counsel, there will continue to be a real prospect that their evidence will be improperly influenced through their counsel. Director Scott expressed the view during our investigation that the most effective way to deal with this issue is to prohibit witness officers from consulting before they write up their notes as well as during SIU interviews.
- 83** If the practice of allowing all witness officers to be represented by the same counsel is allowed to continue, one way of further minimizing the risk of advertent or inadvertent transfer of information through counsel would be to ensure that officers are required to complete their notes relating to incidents under SIU investigation before they consult counsel.<sup>16</sup>
- 84** During this investigation we learned of at least one police service in Ontario that requires its officers to prepare their notes without consulting anyone else. However, there continues to be strong resistance to this approach in the policing community.

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<sup>15</sup> See *supra* note 7 and accompanying text.

<sup>16</sup> This suggestion was made by Ian Scott in various versions of a draft article, dated September 22, 2009, June 28, 2010, and January 3, 2011, concerning police note preparation practices, which the Ministry dissuaded him from submitting to the Criminal Law Quarterly.

- 85** The Court of Appeal in *Schaeffer* clarifies that officers aren't entitled to have lawyers vet their notes or assist them with note preparation. However, the court did find that officers were entitled to receive basic legal advice about their rights and duties. Given the significance of this issue and the prolonged conflict regarding the scope of the duty to prepare police notes, it is still worth reviewing this subject in greater depth.

## Taking Note of the Importance of Independent Recall

- 86** Witness officers are required to complete their notes on an incident under investigation by the SIU "in accordance with his or her duty."<sup>17</sup> They are also required to provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. Subject officers must also complete full notes, but these are retained by the police service and not disclosed to the SIU.
- 87** Preparation of notes is a normal part of the police officer's duty.<sup>18</sup> The importance of independent and contemporaneous note taking is emphasized during training at the Provincial Police Academy and the Ontario Police College.<sup>19</sup>
- 88** In February 2003, Mr. Adams described the fact that some officers involved in SIU investigations had received legal advice to refrain from completing their notes until they had consulted with their lawyers as "very problematic."<sup>20</sup>
- 89** Justice Sharpe noted in *Schaeffer* that Justice Low had reviewed the history of the "debate" around note preparation in her decision, including the 2003 report on the SIU by George Adams and my 2008 report.<sup>21</sup> Both reports discussed and criticized the practice of witness and subject officers consulting the same lawyer prior to completing their notes. Justice Sharpe explained that it was

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<sup>17</sup> O. Reg. 267/10, s. 9.

<sup>18</sup> *Ontario (Police Complaints Commissioner) v. Toronto (Metropolitan) Police Force (Kerr Complaint)* (1997), 143 D.L.R. (4<sup>th</sup>) 471 at paras. 11-13 (C.A.); *R. v. Schertzer*, [2007] O.J. No. 3560 at paras. 14, 16, 21 (Ont. Sup. Ct.) (QL), rev'd on other grounds [2009] O.J. No 4425 (Ont. C.A.).

<sup>19</sup> See *Schaeffer*, *Trial, supra* note 10 (Factum of the Respondent Ian Scott, Director of the Special Investigations Unit, at para. 29).

<sup>20</sup> *Supra* note 8 at 55.

<sup>21</sup> *Schaeffer*, *Court of Appeal, supra* note 11 at para. 26.

common ground on the appeal “that the duty to create independent and contemporaneous notes of events that transpire during a police officer’s ordinary duties is fundamental to the professional role of a police officer.”<sup>22</sup> He also remarked:

Reliable, independent and contemporaneous police officer notes are central to the integrity of the administration of criminal justice. Police officers’ notes provide the basis for laying charges and they provide Crown attorneys with a record upon which to base decisions regarding the prosecution of the case. Furthermore, in the post-Stinchcombe era of mandatory Crown disclosure, police notes provide the accused and his or her counsel with vital information to inform decisions as to how to plead and how to conduct ... the defence.

Police officers’ notes are also used to assist the officer in testifying at trial. When used for that purpose, it is vitally important to the reliability and integrity of the officer’s evidence that the notes used record the officer’s own independent recollection.<sup>23</sup>

- 90 Justice Sharpe observed that there was no suggestion that police officers consult with legal counsel before preparing their notes in non-SIU investigations. He found that the problem in SIU investigations was that in seeking legal advice, officers were concerned with their own self-interest or the interest of fellow officers, rather than their overriding public duty, of which note-taking was a core element.<sup>24</sup> Justice Sharpe reasoned, “without imputing any impropriety” to lawyers representing officers, that legal advice is likely to influence how officers write their notes. He remarked:

Consequently, the notes would not be a straightforward record of the officer’s independent recollection but would reflect the lawyer’s legal advice. ...

In my view, the lawyer-induced refinements or qualifications that would almost certainly flow from lawyer involvement in the note-making process would undermine the very purpose of a police officer’s notes, namely to record the officer’s independent and contemporaneous record of the incident. It follows that a police officer who seeks legal advice in connection with the preparation of notes, other than with respect to the

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<sup>22</sup> *Ibid.* at para. 67.

<sup>23</sup> *Ibid.* at paras. 69 and 70.

<sup>24</sup> *Ibid.* at para. 72.

obligation to prepare notes, or who asks legal counsel to view or vet notes, fails to live up to this duty.<sup>25</sup>

- 91** Justice Sharpe concluded that, consistent with their public duty, officers are prohibited from obtaining legal assistance in the preparation of their notes. But he did not forbid consultation entirely. Justice Sharpe sought a balance between the regulatory right to counsel and the duty to make independent and contemporaneous notes. He found that officers are still able to obtain basic legal advice about their general rights and obligations, even before they prepare their notes, provided that advice can be obtained without delay and subject to the limitation that the advice cannot relate to the content of the notes the officer is required to prepare.<sup>26</sup>
- 92** While it is too soon to judge the impact of the recent *Schaeffer* decision, during this investigation we learned that it was still common for officers to consult their police association or counsel prior to preparing their notes in SIU incidents. Director Scott has observed that 46 out of 175 cases arising from the Toronto Police Service from January 2006 to December 2008 had positive indicators that an association lawyer conferred with multiple officers before they wrote up their notes.<sup>27</sup> He referred to one case where an association lawyer was present at a division station within an hour and a half of an SIU incident, but the SIU was not notified for another four hours. In another case, an association lawyer was present within 10 minutes of a woman being found dead in a jail cell, yet the SIU was not notified for another eight hours. One regional police service has apparently even issued internal directives ordering

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<sup>25</sup> *Ibid.* at paras. 73 and 74.

<sup>26</sup> *Ibid.* at paragraph 77; see also paragraphs 81 and 82, where Justice Sharpe indicated:

“...the officer is entitled to legal advice on matters such as the following:

- he or she is required to complete notes of the incident prior to the end of his or her tour of duty unless excused by the chief of police;
- the lawyer cannot advise the officer what to include in the notes other than that they should provide a full and honest record of the officer’s recollection of the incident in the officer’s own words;
- the notes are to be submitted to the Chief of Police;
- if the officer is a subject officer, the Chief of Police will not pass the notes on to the SIU;
- if the officer is a witness officer, the Chief of Police will pass the notes on to the SIU;
- the officer will be required to answer questions from the SIU investigators; the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview.

Advice of this nature can readily and quickly be given and received by telephone....”

<sup>27</sup> *Supra* note 16.

officers involved in SIU incidents not to write up their notes until they have consulted with counsel or an association representative.<sup>28</sup>

- 93** The prevalence of this practice may be best illustrated by the general advice given by a lawyer who routinely represents multiple officers in SIU matters:

I was tempted to have a pencil manufactured with the slogan “shut the F up” embossed on it so that when police officers began to write their notes, they would pause and first give me or their association a call. I think I may still do it. The first few hours of an SIU investigation are the most important. They decide the future of your career. They may even decide your liberty.<sup>29</sup>

- 94** Director Scott has emphasized that officers’ notes are the first memorization of events, and that it is critical that they be prepared as soon as possible – and independently. In the factum filed on his behalf in the Minty/Schaeffer matter, it was argued:

Involving legal counsel (or an association representative) in the note-taking process is incompatible with the duties required of officers for proper note taking. First, the delay involved in such consultation can adversely affect the timeliness of officer note taking. Second, and more important, consultation with counsel in the note-taking process can compromise the independence of the notes, and this in turn may adversely impact upon a criminal investigation and prosecution. This will be the case in the context of an ordinary criminal investigation, but raises particular concern in the context of an SIU investigation where police conduct is at issue and there is a heightened public interest in ensuring both the integrity of the investigation, and the appearance of integrity.

- 95** Outside of the SIU context, the courts have stressed the need for officers to prepare their notes as soon as possible and independently in order to avoid their memories becoming tainted with the observations of others.<sup>30</sup> In *R. v. Barrett*, the court said:

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<sup>28</sup> *Ibid.* at 2.

<sup>29</sup> Gary Clewley, “Officers and the SIU” *The Back-Up: Hamilton Police Association Newsletter* 4:2 (Summer 2009) 25.

<sup>30</sup> *R. v. Barrett* (1993), 82 C.C.C. (3d) 266 at para. 17 (Ont. C.A.), rev’d on other grounds [1995] 1. S.C.R. 752 [*Barrett*]; *R. v. Green*, [1998] O.J. No. 3598 at paras. 19, 20, 22, 23, 45 (Ont. Ct. J. (Gen. Div)) [*Green*]; *R. v. Mattis* (1998), 20 C.R. (5<sup>th</sup>) 932 at paras. 21-23 (Ont. Ct. J. (Prov. Div.)); *R. v. Bowerbank*, [2001] O.J. No. 755 at paras. 47-48 (Ont. Sup. Ct.); *R. v. Fisher* (2008), 78 W.C.B. (2d) 68 at para. 87 (Ont.

Whenever possible, every officer in attendance at the interview who will want to refer to his or her notes as a memory aid for the purpose of giving evidence should take contemporaneous, independent notes.<sup>31</sup>

- 96** In *R. v. Green*, the court found that two officers had collaborated in writing up their notes, and commented:

To the extent that the officer obtains information about other officers' observations before doing her notes, her memory may become tainted with the observation of others and both her notes and her own evidence may be rendered less reliable.<sup>32</sup>

- 97** Given the need to instill public confidence in the system of civilian oversight of police, it is crucial for police notes in connection with SIU investigations to be prepared independently and contemporaneously. The Honourable Roger Salhany, Q.C., observed in his report into the investigation and prosecution of a Manitoba police officer responsible for the vehicular homicide of Crystal Taman that:

The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator....

The proper practice is for each officer to make his or her own independent set of notes. When officers collaborate in preparing notes, there is a serious risk that one officer may unconsciously supplement something from the other officer's recollection which he or she never observed. If it is then written down in the officer's notebook to be used to refresh his or her memory, it will become part of the officer's recollection even though he or she never saw it. Once combined memories are committed to a uniform set of notes, each officer will later refresh his or her memory as to an event that they never saw.<sup>33</sup>

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Sup. Ct.); *R. v. Flores*, [1994] O.J. No. 3124 at paras. 54-56, 65, 66 (Ont. Ct. J. (Prov. Div.)); *R. v. McKennon*, [2004] O.J. No. 5021 at para. 35 (Ont. Sup. Ct.).

<sup>31</sup> *Barrett*, *ibid.* at para. 17.

<sup>32</sup> *Green*, *ibid.* at para. 22.

<sup>33</sup> Manitoba, Public Inquiry, Report of the Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk by Commissioner Hon. R. Salhany, Q.C. (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2008) at 133 and 137.

- 98** Note-taking requirements vary amongst police services. In 1998, the Honourable Fred Kaufman recommended that the Ministry of the Solicitor General immediately implement a provincewide policy for police note taking and note keeping. He observed in part that:

Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities....

Supervision of police note taking is often poor; enforcement of police regulations as to note taking is equally poor. Ontario police services must change their policies to ensure real supervision of note-taking practices, including spot auditing of notebooks.<sup>34</sup>

- 99** However, no action has ever been taken to implement Mr. Kaufman's recommendation on police note taking.

- 100** At present, the Ontario Provincial Police requires its officers to write up their notes prior to the conclusion of the officer's daily tour of duty or as approved by a supervisor.<sup>35</sup> However, as evidenced by the Minty and Schaeffer cases, note preparation may still be delayed in SIU cases while officers consult counsel. In the Minty case, while a sergeant reminded the officers that they should complete their notebook entries before reporting off duty, they were also instructed not to make further notes until they spoke to legal counsel. The sergeant who had given the instruction did not complete his notes until the next day, after he had spoken with counsel. In the Schaeffer case, Constable Wood and Acting Sergeant Pullbrook were instructed to delay making notebook entries until they had consulted counsel. They did not complete their notes until two days after the incident, and only after they had consulted their jointly appointed lawyer.
- 101** The SIU continues to encounter cases where OPP note preparation is delayed while officers consult counsel. In the case in Elgin County where it was an officer rather than a civilian who was killed in a motor vehicle accident,

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<sup>34</sup> Ontario, Public Inquiry, Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin by Commissioner Hon. Fred Kaufman C.M., Q.C. (Toronto: Publications Ontario, 1998) at 34 (recommendation 100).

<sup>35</sup> See Schaeffer, *Trial, supra* note 10 (Factum of the Respondent Ian Scott, Director of the Special Investigations Unit, at para. 35).

Director Scott reported that two of the involved OPP officers made late entries to their notes on advice of counsel.

- 102** In June 2010, Helen Proulx of Kenora sustained non-fatal gunshot wounds as a result of interaction with an OPP officer. The OPP were 50 minutes late in reporting the case to the SIU. In his July 30, 2010 press release on the SIU's investigation, Director Scott commented on the notification delay as well as the fact that two witness officers, who had been off duty but had come to assist, were instructed by their counsel not to write up their police notes, "but do notes to counsel." Neither officer prepared notes until the following day, and only after they were ordered to do so by a superior officer. Director Scott observed:

... it is disturbing that the advice of an association lawyer not to write up notes appears to be trumping the duty of officers to write contemporaneous notes, particularly when their observations relate to an incident as serious as this one.

- 103** The practice of delaying note preparation in order to consult with counsel is not restricted to the OPP. SIU records identify at least eight police services where counsel was involved in note preparation, at times resulting in delayed completion of notes. In a case involving the Hamilton Police Service, a man suffered a broken toe, a large laceration over his eye and numerous abrasions during his arrest on April 25, 2010. Director Scott observed in his investigative report that while a witness officer had written the bulk of his notes before the end of his shift and before the SIU had invoked its mandate, after speaking with counsel the next day, he wrote late entries that were similar to the notes of the other officer involved, who shared the same lawyer.
- 104** On August 4, 2010, Director Scott issued a press release upon closing an investigation into a firearm injury in Ottawa. While Director Scott concluded that the subject officer was justified in using potentially lethal force against 19-year-old Ryan Charles, he expressed concern about the preparation of witness officers' notes. In that case, the SIU had been notified of the incident at 10:55 p.m. on June 22, 2010. By 11:25 p.m., before the arrival of any SIU investigators, an association lawyer had spoken to a number of witness officers, and, as one of them recorded in his notes, "okay[ed] all submissions."
- 105** In October 2010, Director Scott reported on a case involving the Toronto Police Service and the injury of a person in custody, where a witness officer had written up notes for counsel and only later recorded the event in his memo book. The officer refused to answer any questions about the original notes during his SIU interview.

**106** To address the issue of delayed note preparation in SIU cases, Mr. LeSage has recommended that section 9 of Ontario Regulation 267/10 be amended to add the following subsection:

9.(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.

**107** This recommendation would appear to represent a codification of the OPP's current policy, but not necessarily the practice followed in SIU matters. New amending regulation O. Reg. 283/11 reflects Mr. LeSage's recommendation concerning the timing of note preparation. This regulatory change should contribute to a more consistent approach with respect to the timing of note preparation in SIU cases throughout the province. However, considerable scope is still left to the discretion of the individual chief of police, the OPP commissioner and their designates to excuse timely note preparation.<sup>36</sup> Consistent with the public nature of an officer's duty to prepare notes promptly, the circumstances in which delay is permitted should be clearly circumscribed. Given the many instances where note preparation has been postponed in questionable circumstances, it would be helpful if some criteria were also set out to assist in determining what situations would justify delayed note preparation, such as psychological duress or physical injury. In light of the importance of the SIU having reliable evidence upon which to base its assessments of criminality, the time frame for completing notes should only be waived in exigent circumstances, for example, where a health practitioner confirms the officer is not fit to complete the notes as required.

**108** Mr. LeSage's recommendation and the resulting regulatory change address concerns about the "**contemporaneity**" of police notes. However, they do not address the need for notes to be prepared **independently**. While the *Police Services Act* regulations give officers the right to consult counsel and to be accompanied by counsel to SIU interviews, they are silent as to counsel's role in relation to note preparation.

**109** The Court of Appeal in *Schaeffer* underscored the importance of limiting counsel involvement in note preparation. Justice Sharpe stressed that the obligation to prepare notes while on the same tour of duty is inconsistent with the proposition that police officers are entitled to await the arrival of counsel

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<sup>36</sup> Under section 2 of O.Reg 267/10, the Chief may delegate powers to any officer other than a subject or witness officer.

and to obtain the assistance of counsel in the preparation of their notes.<sup>37</sup> If the public is to continue to have confidence in the integrity of the system of police oversight through the SIU, it is necessary for there to be assurance that police notes are prepared promptly and independently without the influence of counsel.

- 110** Complementary to the Court of Appeal's decision on this point, this could be achieved through further refinement of the amendment recommended by Mr. LeSage or through a directive from the Ministry of Community Safety and Correctional Services, which ultimately is accountable for policing in this province.<sup>38</sup>
- 111** The controversy around the involvement of legal counsel with the preparation of police notes resulted in a state of stalemate for many years. Police association lawyers continued to represent multiple officers in SIU investigations and advise them as to their note preparation. SIU investigators following Director Scott's instructions routinely inquired about note preparation when they interviewed officers, and officers, following the advice of their lawyers, invariably refused to comment on whether they discussed their notes with anyone including their legal counsel. On occasions when officers prepared draft notes for review by counsel, they claimed privilege and refused to disclose them to the SIU.
- 112** Director Scott has repeatedly expressed concern about the refusal of officers to answer questions about their note preparation in his reporting letters to chiefs of police and the commissioner of the OPP. He has generally requested that these officials investigate these regulatory contraventions and report back to him. The following quote is typical of the language he has used to make such requests:

Please find an attached appendix indicating that the named witness officers refused to answer a question posed to them by an SIU investigator, an apparent breach of s. 8 of O.Reg 267/10 to the *Police Services Act*. I would be grateful if you inquired into this apparent disciplinary issue and provide my office with a written response.

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<sup>37</sup> *Supra* note 11 at para. 75.

<sup>38</sup> Director Scott has suggested that the best approach is for a separate regulation or Ministry of Community Safety and Correctional Services directive on notes to be issued, as otherwise there is potential for conferral with counsel before the SIU mandate is invoked.

- 113** It is rare for Director Scott to receive a reply regarding steps taken by a police service to address its officers' failure to co-operate with SIU investigations. It is far more common for Director Scott to be rebuked by senior police officials for calling public attention to this issue and for attempting to interfere in internal police matters.

## Mind Your Own Business, Not Police Business

- 114** In the past, it was not unusual for the SIU to raise concerns about police conduct, whether related to compliance with the SIU requirements or contravention of internal police policies, with the relevant chiefs of police or the commissioner of the OPP. Often this was done by way of casual telephone discussions or through informal meetings. As noted in *Oversight Unseen*, this approach met with "mixed results." At times, police services would commit to take corrective action, and in some cases would advise the SIU of the outcome of their parallel internal investigations carried out under section 11 of the regulations, along with any resulting discipline. But in many cases there was no response. In *Oversight Unseen*, I encouraged the SIU to be more assertive in ensuring that incidents of non-compliance with the legislative and regulatory requirements were analyzed and pursued:

### **Recommendation 3**

**The Special Investigations Unit should ensure that all police delays or other failures in complying with legislative and regulatory requirements are properly analyzed and that rigorous action is taken to ensure compliance, including publicizing incidents of non-compliance and application to the courts for determinative settlement of disputed interpretation.**

- 115** Consistent with this recommendation, Director Scott has been vigilant in following up on instances where officers have not complied with the regulatory requirements. However, his attempts to engage senior police officials regarding these issues have met with significant resistance. Many have charged that in raising these concerns, Director Scott has overstepped his mandate and attempted to stray into territory reserved for the chiefs and the OPP commissioner.

- 116** Director Scott's letter-writing campaign has led to increased friction with senior police officials. Minutes from a March 25, 2009 meeting of the Ontario

Association of Chiefs of Police SIU Committee, under the title "SIU Letters," note:

Recently the Director of the SIU has begun writing letters to the Chiefs of Police demanding answers to issues that fall under the Section 11 investigation. The SIU investigation is criminal, the Section 11 investigation is about conduct, services provided and policy. The SIU committee strongly urges police chiefs to not respond to these letters.

- 117** Apparently, many OACP members have heeded this advice. Between October 18, 2008 and October 31, 2011, Director Scott wrote 227 letters raising issues of concern with police co-operation. Some 13 of these also contained comments about other problematic police practices or policies, as did an additional five letters in which Director Scott identified concerns with police policy or police misconduct unrelated to an SIU investigation. Director Scott has received only 32 written responses, and of those, only 20 actually addressed the substance of his concerns. In many cases, it was simply suggested to Director Scott that he was acting beyond his authority. After Director Scott reported on the Schaeffer case in September 2009, he engaged in a relatively heated exchange of correspondence with OPP Commissioner Fantino. The Commissioner eventually rejected Director Scott's suggestion that they meet to discuss the subject of the independence of note preparation, on the grounds that this topic was outside the Director's mandate. Both the OPP and the Toronto Police Service have made it clear that they will not provide any further responses to Director Scott regarding his concerns about police conduct in apparent breach of the *Police Services Act* regulations.
- 118** Up to October 31, 2011, Director Scott had identified 38 instances involving interference in the note-taking process, 142 cases where officers refused to discuss their note preparation during their interviews, and one where an officer changed his story after consulting with counsel, who represented three other witness officers. On May 16, 2011, Director Scott wrote to a local police force and the OPP, noting that he had found the evidence of an OPP sergeant involved in a firearm injury case to be "simply unreliable." Police had received a complaint that a man with a history of mental health issues was threatening others in the residential rooms above a bar. He had apparently come out of his room a couple of times with a knife in each hand. At one point, the man opened his door, stepped out of his room, put his head down with his hands clenched by his side and knuckles forward and ran towards a police sergeant. The sergeant discharged a conductive energy weapon at the same time the subject officer fired his gun. The man suffered gunshot wounds to the lower abdomen and left shoulder. No knife was found at the scene. A critical issue in

the case was whether the subject officer had held a reasonable belief that the man had a knife in his hand at the time he was shot. The sergeant had initially told SIU investigators that he had not seen the man carrying anything, saw nothing in his hands that would necessitate shooting him, and at no time did he ever see a weapon. After his lawyer requested a break to speak with him, the sergeant returned after five minutes and “clarified” that he had feared for his life as the man charged of his room with two knives, that he fully expected to be stabbed, and that the man “certainly had the capability of hiding two knives in the way his hands were.” Director Scott observed that it was impossible to reconcile the answers the sergeant gave to the SIU investigators before and after the break, and asked that the Commissioner inquire into the matter with a view to taking disciplinary action against the officer for providing inconsistent statements in his SIU interview. The Commissioner did not respond.

- 119** An additional 42 letters identified a variety of other concerns relating to police conduct, such as denying the SIU access to a scene, withholding relevant documents, failing to segregate witnesses, and improperly interviewing witnesses. In a May 10, 2010 firearm death case, the OPP interviewed civilian witnesses as part of an ongoing attempted murder investigation – despite the fact that the suspect was deceased and the prospect of laying charges moot. In that instance, the OPP also refused SIU investigators access to the incident scene for 30 minutes, and it was found that an officer had made a veiled threat to the deceased’s father in connection with any statements he made to the SIU, saying “we live here, they [the SIU] don’t.” The Commissioner of the OPP made an exception in this case and did respond to Director Scott. Interestingly, while the officer did admit in the internal OPP investigation to making the remark, the probe concluded that it was not intended or perceived to be intimidating, but was rather an offer of assistance.
- 120** In another firearm death case, Director Scott discovered that OPP officers had conducted detailed interviews with two material civilian witnesses prior to the SIU being notified, and that after notification they still continued to take detailed witness statements. The weapons used by the three subject officers had also been cleared prior to being turned over to the SIU, although there was no safety reason for doing so. Director Scott’s request for a response about these problematic practices went unanswered. Similarly, Director Scott received no response when he wrote to a police chief on June 28, 2011 about police interviewing four civilian witnesses after the SIU was notified of an in-custody death, as well as note preparation in circumstances where the same lawyer represented a witness officer and the subject officer.

- 121** In another case, the Toronto Police Service refused the SIU entry into a crime scene after a man who had apparently killed his wife was shot by an officer. Director Scott wrote to Toronto Police Chief Bill Blair, submitting that this action breached the regulations requiring the scene to be secured pending the SIU taking charge, and confirming that the SIU is the lead investigator in connection to SIU incidents (sections 4 and 5 of O. Reg. 276/10 (then Reg. 673/98)). Director Scott remarked:

...a senior member of your Service breached this established protocol and arguably fell foul of both the spirit and wording of the legislation by denying the SIU investigators priority over, indeed access to, this scene.

Chief Blair did meet with Director Scott to discuss this case. However, as Director Scott describes it, there was “no meeting of the minds.” The Chief maintained that the police had a right to carry on with their parallel investigation, and that the SIU’s lead role is restricted to its own investigation of an incident.

- 122** On April 27, 2011, Director Scott wrote to another police service about a subject officer who denied pursuing a man on a motorcycle that later crashed, seriously injuring its rider. Evidence obtained by the SIU contradicted the officer, including Automatic Vehicle Locator data that confirmed that his police car had been travelling down city streets at speeds of up to 116 km/hr. Director Scott suggested that the service might wish to consider charges against the officer under the Police Code of Conduct for breaching the duty to co-operate with the SIU, as well as for deceit and/or breach of the Suspect Apprehension Pursuit regulation. In addition, he suggested that the service consider charging the officer under the *Highway Traffic Act* for speeding, racing, and failing to obey stop signs. The SIU later received an email indicating that the officer in question would be disciplined under the *Police Services Act*.
- 123** In another case, in addition to charging a constable with dangerous driving causing bodily harm, as a result of a motor vehicle collision, Director Scott wrote to the officer’s police chief on August 5, 2011 about the officer’s conduct after the accident. A young man advised the SIU that as he was taking photographs of the collision scene, the subject officer ordered him into the back of his cruiser and forced him to delete his photographs or risk being charged criminally. There was some corroboration of this information by a bystander, who explained that he had watched as the officer yelled profanities at the man, forced him into a police car by kicking his legs, and screamed at him about photographs. Director Scott suggested to the chief that if the witness account

were true, it could support a charge against the constable of attempting to obstruct the course of justice, and minimally constituted a number of breaches of the Police Code of Conduct.

- 124** On August 26, 2011, Director Scott wrote to the Chief of the Peel Regional Police about the results of his investigation into the incident in which Michelle Rosales was bitten by a police dog. The Peel Regional Police refused to produce reports about the dog's conduct history, on the basis that the subject officer had authored them. Director Scott was critical of this failure to co-operate with his investigation. He pointed out that while notes of an incident prepared by a subject officer were not to be provided to the SIU, this prohibition did not apply to prior records generated in the usual and ordinary course of business of a police service. He expressed that without the reports, he was deprived of information relevant to the issue of whether or not the subject officer was criminally negligent in his handling of the dog.<sup>39</sup> He noted that this was one of the reasons he could not complete an adequate investigation into the case (the other was related to notification of SIU about the incident). The Chief did not reply.
- 125** Director Scott raised issues in 16 cases relating to failure to notify the SIU and in 34 more about delayed notification (including those highlighted on pages 11-15). He received no replies to his concerns.
- 126** On May 16, 2011, Director Scott wrote to the Chief of the Toronto Police about a case where they had failed to provide any notice to the SIU about a man who suffered a broken finger, fractured ribs and a black eye. Similarly, he wrote the Chief on July 8, 2011, and again on August 17, 2011, about notification delays of over six hours. In the latter case, the subject officer had also investigated the incident and released the scene. The Toronto Police Service waited a couple of weeks to notify the SIU that it had reopened a sexual assault case that had been opened and closed in 2007 without the SIU ever having been notified. Chief Blair did not respond to any of these issues.
- 127** At times, Director Scott has also raised more general concerns about the conduct of officers in relation to police policies and practices. Up to October 31, 2011, he had written 18 letters identifying such concerns. In a letter dated

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<sup>39</sup> This was the third complaint featuring the same police dog since July 2010, and the second time that his historical records had been requested by the SIU, and that police officials had refused to release them. In an October 8, 2010 letter from Director Scott to the Chief, he rejected the Service's position that the records were irrelevant, noting that they would have permitted the Unit to more comprehensively assess the potential criminal negligence on the part of the subject officer.

February 17, 2009, he wrote to the Thunder Bay Police Service about a strip search of a 15-year-old aboriginal girl that appeared to breach police policies. He noted that video footage of the incident showed officers using offensive and racialized language. There were several violations of the Care and Handling of Prisoners policy, including allowing male officers to be spectators. One male officer also used a knife to cut off the girl's undershirt during the search, a "dangerous" action that Director Scott considered "could have had disastrous results." Director Scott suggested that charges under the *Police Services Act* should be considered in connection with the incident. He did not expressly request a response, and none was received.

- 128** In another letter dated February 17, 2009 to Toronto Police Chief Blair, Director Scott raised questions about the conduct of an officer who had fired a shot at the driver of a stolen car. He noted that some of the officer's actions were in violation of the Toronto Police Service's Suspect Apprehension Pursuit guidelines. Once again, the Chief did not reply.
- 129** When Director Scott wrote to the Commissioner of the OPP on February 18, 2009, observing that the SIU wasn't notified of the incident where the officer broke his own arm while breaking a man's nose, he also commented on flaws in the OPP's internal investigation of the case prior to SIU involvement, which raised suspicion that it had not been carried out with the requisite degree of independence. Specifically, the internal investigating officer had known the subject officer for 10 years, the OPP did not obtain a statement from a witness who had made a 911 call regarding the altercation, and had not obtained any witness statements or conducted a witness canvass. Once, again Director Scott's concerns met with silence.
- 130** On May 12, 2011, Director Scott wrote to the York Regional Police, expressing concern about a possible breach of the Suspect Apprehension Pursuit regulations in an incident where officers shot 18 times at a suspect vehicle and its driver. The Chief did not respond.
- 131** Director Scott also wrote to Chief Blair on August 24, 2011 about sexual assault allegations relating to a specific police unit. He observed that there had been four similar allegations in three years, and that one that had led in June 2011 to a conviction of an officer for both assault and sexual assault. He suggested that there appeared to be a pattern of misconduct involving certain members of the unit. The Chief did not reply. An officer from the same unit

was charged by the SIU Director in 2009 and convicted of assault and sexual assault on November 21, 2011.<sup>40</sup>

- 132** One of the areas that Mr. LeSage was tasked with considering was “when and how the chief of police investigates and reports findings of an incident.” Undoubtedly, this issue was placed on the agenda as a result of the negative reception that Director Scott’s letters received. In his report, Mr. LeSage did not actually make any recommendations about this issue. However, he made the following observations:

Section 11 of O. Reg 267/10 is clear. The chief of police shall investigate any incident for which the SIU has been notified. The chief of police of a municipal police force reports his or her findings to the Police Services Board. The OPP commissioner is obliged to prepare a report of his or her findings and any action taken. The SIU director’s authority does not extend to requiring the chief of police or OPP commissioner to investigate or report to him and should not be part of the SIU director’s communication with the chief of police or OPP commissioner.

- 133** My review of Director Scott’s letters to chiefs of police and the commissioners of the OPP does not indicate that he has ever attempted to “require” them to conduct an investigation or report back to him on the outcome of internal investigations. What Director Scott has done is identified legitimate concerns about breaches of the legislative requirements governing police conduct in SIU investigations. He has not demanded reports back, but has respectfully requested written responses. Director Scott has also referenced concerns about policy breaches as well as improper practices uncovered through his investigations, and has encouraged police officials to take appropriate action to address these. I do not see these efforts on the part of Director Scott as an attempt to usurp the role of police chiefs or the commissioner with respect to matters of internal police discipline. It is quite apparent that Director Scott’s goal is to generally enhance the integrity of SIU investigations and contribute to greater overall accountability and public confidence in policing. A protocol recently developed between the Ministry of the Attorney General and the Ministry of Community Safety and Correctional Services contemplates that

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<sup>40</sup> Robyn Doolittle, “Officer facing assault charges,” *Toronto Star* (23 December 2009) online: <http://www.thestar.com/news/gta/article/742237-officer-facing-assault-charges>. The officer was later found guilty of one count each of assault and sexual assault on November 21, 2011. See Curtis Rush, “Toronto cop who squeezed motorist’s testicles found guilty of sexual assault,” *Toronto Star* (23 November 2011) online: <http://www.thestar.com/news/crime/article/1091590--toronto-cop-who-squeezed-motorist-s-testicles-found-guilty-of-sexual-assault>.

systemic issues affecting policing that are identified by the Director of the SIU will be raised and discussed between those ministries. It would be strange and unproductive if Director Scott could not also address these issues directly with the individual police services where such problems have emerged.

**134** Given the checkered history of the relationship between the SIU and police interests, and the ongoing problems related to non-compliance with the SIU's authority, I made recommendations in *Oversight Unseen* to reinforce the integrity of the SIU oversight through the creation of enforcement mechanisms. I continue to believe that additional incentive is necessary to ensure that the effectiveness and credibility of the SIU is reinforced through police compliance with regulatory requirements. Given the entrenched culture of resistance to SIU oversight, relying on the heads of police services alone to encourage co-operation is insufficient. Blatant non-co-operation continues to this day, and it is clear that, in at least some instances, police officials up the chain of command are complicit. Accordingly, I continue to believe that the following recommendations would address some of the longstanding challenges faced by the SIU in encouraging police co-operation with its mandate:

**Recommendation 37**

**The Director of the Special Investigations Unit should have the discretion to refer incidents of police breach of legislative and regulatory requirements relating to co-operation with the Unit's investigations directly to the Ontario Civilian Commission on Police Services (now the Ontario Civilian Police Commission) for consideration under the discipline process.**

**Recommendation 38**

**Police failure to co-operate with or obstruction of the Special Investigations Unit should be made an offence punishable by fine or imprisonment consistent with similar provincial offences.**

**135** I do not read Mr. LeSage's comments as preventing the Director of the SIU from continuing to identify issues of concern in his correspondence with chiefs of police and the commissioner of the OPP. While he is unlikely to receive a response given the current climate of hostility, he should not be prevented from politely requesting one. Quite frankly, I find the attitude taken by a significant number of police services, including the OPP, to Director Scott's letters to be unnecessarily disrespectful and counter to the public interest in effective police oversight. Good policing in this province is everybody's business.

**136** The SIU is not alone in having an interest in the outcome of the internal police investigations relating to SIU investigations. The more open the oversight and internal disciplinary process is, the more confidence the public will have in policing in this province. In *Oversight Unseen*, I expressed concern about the lack of transparency in SIU investigations. In 1998, Mr. Adams recommended that Director's reports be made public in cases where charges are not laid. While the SIU adopted a practice of issuing more detailed press releases in such cases, I was of the view that continuing to shroud Director's reports in secrecy did little to encourage confidence in the SIU's investigative process. Accordingly, I made the following recommendation:

**Recommendation 39**

**The Special Investigations Unit should be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge, subject to the Director's discretion to withhold information on the basis that disclosure would involve a serious risk of harm.**

**137** I also expressed the view in *Oversight Unseen* that the outcome of parallel internal police investigations connected with SIU investigations should be made public. At present, police services boards (which receive internal investigative reports from chiefs), and the commissioner of the OPP (who prepares a report that is not subject to external review), have discretion to disclose their internal reports relating to SIU cases (s. 11(4)(5), O.Reg. 267/10).<sup>41</sup> In *Oversight Unseen*, I suggested that publicizing these internal reports would serve the dual purpose of providing the SIU with information that might be useful in the conduct of its investigations, as well as enhancing the police oversight process. At that time, I made the following recommendation:

**Recommendation 44**

**The internal police investigative reports related to Special Investigations Unit investigations and any action taken as a result should be made public.**

**138** I believe that concerns about release of sensitive or confidential information in these reports can be addressed through careful editing in order to balance privacy interests and the risk of harm with the public interest in transparency. To avoid interfering in prosecutions, in the event charges that are laid against officers as a result of internal investigations, rather than releasing the

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<sup>41</sup> Generally, internal police investigation reports are not publicly disclosed. The information concerning the reports prepared in the *Minty* and *Schaeffer* cases contained earlier in this document comes from materials disclosed in the *Schaeffer* litigation.

corresponding report, the fact and nature of the charge could be publicized, as well as the eventual outcome.

- 139** Openness should be the default position for reporting on the results of investigations relating to serious injuries and death. In *Oversight Unseen*, I encouraged the SIU to speak openly about police resistance to its mandate, as well as any general policing trends identified through its investigations:

**Recommendation 3**

**The Special Investigations Unit should ensure that all police delays or other failures in complying with legislative and regulatory requirements are properly analyzed and that rigorous action is taken to ensure compliance including publicizing incidents of non-compliance, and application to the courts for determinative settlement of disputed interpretation.**

**Recommendation 22**

**The Special Investigations Unit should make public significant concerns regarding policing practices and trends such as those relating to the use of Tasers and custodial practices, which it identifies during the course of its investigations.**

- 140** Director Scott has made a concerted effort to follow these recommendations. Today, his office issues press releases in all death cases, as well as many others. In a number of press releases, he has openly raised issues of concern connected with SIU investigations, which has incited considerable police backlash.

## **Open Battle**

- 141** Over the past two years, escalating tensions between the SIU and the policing community have played out in the public arena. Director Scott's public remarks about problematic police conduct, particularly note preparation practices, have attracted strong police reaction. Police services have generally attempted to keep the spotlight off these issues, while police associations have tended to be more open with their censure. Police associations have been highly critical of Director Scott, particularly his position on note-taking practices. The Toronto Police Association, Ontario Provincial Police Association and Police Association of Ontario have all taken direct aim at

Director Scott in their publications.<sup>42</sup> Following the SIU's press release in the Schaeffer case, Commissioner Fantino wrote to Director Scott on September 30, 2009, alleging that Director Scott had inflamed an already volatile situation, and urging him to "fully explore all avenues available to address policy and procedural issues before making inflammatory public statements." On October 5, 2009, the Ontario Provincial Police Association issued a public reply to Director Scott's press release in which it took issue with the Director's statements and supported the practice of officers consulting with counsel before completing their notes.

- 142** In December 2009, when the SIU laid charges of assault and sexual assault against a Toronto Police Service constable, the Toronto Police Association's president publicly denounced the move as politically motivated and "frivolous." He suggested that Director Scott was simply trying to appease me, after I had highlighted the SIU's image as a "toothless tiger" in my report *Oversight Unseen*. On November 21, 2011, the officer in question was found guilty on both charges.<sup>43</sup>
- 143** In response to the SIU's July 30, 2010 press release about the firearm injury sustained by Helen Proulx, Commissioner Fantino wrote to Director Scott to complain about his public reference to delayed notification and the note preparation process:

Why would you find it necessary to denigrate the efforts of OPP officers who were providing assistance after a potentially lethal situation by grumbling about a delay in reporting this incident to the SIU?

... I also find your criticism of two off-duty officers who stopped to provide assistance very disturbing and in total disregard for any sense of morality. These two officers are to be commended for their sense of duty to an injured citizen rather than being publicly chastised for following legal advice re note taking....

<sup>42</sup> See for instance, Rick Perry, "The SIU and SIU Director Ian Scott," *Tour of Duty: The Official Publication of the Toronto Police Association* (June 2009) 13; "SIU Update," *OPPA Blast Out* (November/December 2009); Karl Walsh, "Police Officers' Rights to Counsel Under Attack," *Beyond the Badge: The Official Newsmagazine of the OPP Association* (Issue #176) 2; Colin Perkel, "Concerns persist about police note taking when officers use lethal force," *Blue Line News Week: A Chronicle of News for the Canadian Law Enforcement Community* 15:19 (May 2010) 1; Ron Middel, "A Bigger Hammer," *PAO Magazine* (Winter 2010/11) 14; Larry Molyneaux, "PAO Fights for Officers' Rights to Counsel," *PAO Magazine* (Spring 2011).

<sup>43</sup> *Supra* note 40.

Your continued desire to air your rhetoric through the media serves no useful purpose that I can see, except an attempt to expand your mandate and to bolster the image of the SIU....

To me this smacks of another ‘cheap shot’, which I have never tolerated while I have been Commissioner of the OPP.

- 144** Similarly, Director Scott’s August 4, 2010 press release relating to the firearm injury sustained by Ryan Charles, in which Director Scott raised concerns about a lawyer’s involvement in the preparation of witness officer notes, incited Ottawa Police Chief Vernon White to express “considerable displeasure” and suggest there were avenues to air Director Scott’s grievances with the note-taking protocol other than in the media.
- 145** Director Scott’s observations in connection with the SIU’s investigation of six cases relating to the G20 summit in Toronto in June 2010 also triggered a hostile response. In a November 25, 2010 press release announcing that no charges would be laid in connection with six separate investigations arising from injuries sustained by civilians during that weekend, Director Scott mentioned that, in the case of Adam Nobody, a YouTube video of Mr. Nobody’s arrest corroborated that there had been an incident of probable excessive use of force. He went on to explain that he could not lay charges in connection with the apparent assault on Mr. Nobody, as it was impossible to identify the involved police officer. A few days later, Chief Blair denounced the thoroughness of its investigation of Mr. Nobody’s case. On November 29, Chief Blair – in a radio interview on CBC’s *Metro Morning* – repeatedly criticized the SIU for having relied on the video, referring to it variously as “tampered,” “doctored” and “fabricated.” He also suggested that seconds missing from the video would have shown that the officers were in the middle of arresting a violent armed offender, and remarked that there was “strong evidence that no crime was committed.” These remarks led to the videographer coming forward the next day with a sworn statement attesting to the fact that he had shut the recorder off for a few seconds because he saw police rushing toward him. The SIU investigation was subsequently reopened.
- 146** On December 3, 2010, Chief Blair issued a news release apologizing to Mr. Nobody and stating that he had no evidence that there had been any intent to mislead with respect to the video or that Mr. Nobody had been armed. However, Chief Blair did not retract his original criticism of the SIU’s reliance on the video, and it was reported that other police officers continued to stand

behind his comments. On December 10, Director Scott wrote to Chief Blair, observing that he had disclosed information to the media about the case and reminding him of his obligation not to do so under the regulations (s.12 O.Reg 267/10). Additional videos of the incident later surfaced, and the SIU was able to designate 12 witness and three subject officers. In a press release issued December 21, Director Scott indicated that none of the 12 witness officers who had been in the vicinity or involved in Mr. Nobody's arrest were able to positively identify themselves as being depicted in the videos, nor could they identify the other involved officers. However, sufficient evidence was obtained to charge one officer with assault with a weapon in connection with the incident. Director Scott continued to seek additional information from the Toronto Police Service about how it identified the involved officers in the Nobody case, including any internal communications issued for this purpose. On January 21, 2011, the Chief's legal counsel wrote to Director Scott, advising that such information would have been gathered during the police internal investigation and could not be released to the SIU. He reiterated this position in a letter of January 26. For his part, Director Scott has expressed that parallel police investigations were never meant to shield police agencies from co-operating with the SIU. On July 18, 2011, Director Scott wrote to the Chief, noting that the reopened investigation had been completed. He observed that of 17 Toronto Police officers interviewed, none had made a positive identification of the subject officers who could be seen striking Mr. Nobody in videos and still photographs. Although the SIU interviewed two additional officers involved in the internal police investigation, the TPS persisted in its refusal to produce the results of its internal investigation. The case was ultimately closed again, on the basis that there were no reasonable grounds to believe that any "identifiable officer" had committed a criminal offence.<sup>44</sup>

- 147** A chart summarizing Director Scott's letter-writing efforts and the responses he received appears on the following page.

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<sup>44</sup> The SIU also twice reopened its investigation into the injuries sustained by Dorian Barton during the G20 demonstrations as additional evidence became available, including photographs and video. The SIU's June 10, 2011 press release relating to the case noted that it had asked the Toronto Police Service on multiple occasions for the method used to identify the officers in the Barton incident. Finally, on May 25, 2011, Toronto Police agreed to provide the name of the person who had identified the subject officer. As a result, the SIU conducted further interviews and charged a Toronto constable with assault causing bodily harm.

**SIU Director's Letters to Chiefs re Duty to Co-operate: Oct. 18, 2008-Oct. 31, 2011**

	Toronto	OPP	Niagara	Peel	Ottawa	York	Hamilton	Durham	London	Windsor	Barrie	Other <sup>1</sup>	Total
<b>LETTERS SENT</b>	82	47	16	17	11	17	9	6	2	4	3	13	227
<b>RESPONSES</b>													
Substantive <sup>2</sup>	-	2	6	2	1	3	3	-	-	-	1	2	20
Unrelated <sup>3</sup>	1	6	-	1	1	1	-	-	-	-	-	2	12
<b>ISSUES RAISED</b>													
Failure to notify SIU	6	4	1	2	1	-	1	-	-	1	-	-	16
Delay in notifying SIU	12	8	-	2	3	1	-	-	1	3	-	4	34
Co-operation <sup>4</sup>	18	8	1	2	4	1	2	1	1	-	-	4	42
Practices <sup>5</sup>	7	4	2	-	1	1	1	-	-	1	-	1	18
Interference in note-taking <sup>6</sup>	11	9	4	1	3	1	6	-	1	-	-	2	38
Refused to answer re notes	58	29	12	12	1	15	1	5	1	-	2	6	142

<sup>1</sup> Kingston, Sudbury, Dryden, Chatham-Kent, South Simcoe, Hanover, Orangeville, Thunder Bay and Waterloo police services were each sent 1 letter apiece; services in Peterborough and Halton each received 2.

<sup>2</sup> Substantive response: Police chiefs thank Director for bringing issue to their attention, say they will look into it and/or respond.

<sup>3</sup> Unrelated response: Police chiefs raise concerns with Director's press releases, tell him he is out of his jurisdiction, or say they will not respond to his letters.

<sup>4</sup> Issues include police taking witness statements after SIU's mandate invoked, denying SIU access to a scene, officer conduct, not recognizing SIU as lead investigator, segregation, potential evidence tainting, not providing information to SIU, or police commenting publicly on incidents during SIU investigation.

<sup>5</sup> Director identified best practices, training issues or public safety concerns regarding conduct of officers (outside of SIU mandate).

<sup>6</sup> Cases where officers met with lawyers before writing notes, changed notes after consulting lawyers, or Director noticed statements in notes indicating vetting by lawyers.

**148** In December 2010, the Police Association of Ontario was so incensed by a comment in a *Toronto Star* article attributed to Director Scott, to the effect that officers being investigated for alleged crimes “get all kinds of breaks in the (criminal justice) system,” that it lodged a complaint with the Law Society of Upper Canada. The Association alleged that Director Scott was “destroying public confidence in the criminal justice system” and “biased against police officers.” The Law Society dismissed the complaint on January 13, 2011, without commencing an investigation, and confirmed its position on February 1, 2011, after considering the Police Association of Ontario’s request for a review of its initial decision.

**149** In light of the open conflict between the SIU and police officials, particularly surrounding Director Scott’s press releases, it is not surprising that one of the issues that the Attorney General asked Mr. LeSage to review was “the purpose and content of the SIU press release at the conclusion of an investigation.” Mr. LeSage made the following recommendation on this issue in his report:

I recommend that the SIU director ensure its press release and/or public statement be confined solely to issues required to preserve the integrity of the investigation as proscribed by section 13 of O.Reg. 267/10.

**150** The *Police Services Act* regulations restrict the information that police services and the SIU may disclose while an SIU investigation is being conducted. They provide that the SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless the statement is aimed at preserving the integrity of the investigation (section 13 of O.Reg. 267/10). Mr. LeSage’s recommendation has been interpreted by at least one police association as preventing Director Scott from making observations about police conduct in any of his press releases. The head of the Toronto Police Association recently remarked that the Association was:

...quite happy that Mr. LeSage made a point of dealing with the director of the SIU ... It's been our experience over the last couple of years that there has been a lot of editorializing which has led to a misperception of some of the incidents that have been reported in the paper.<sup>45</sup>

**151** On its face, Mr. LeSage’s recommendation appears simply to confirm the existing conditions applying to press releases issued by the SIU during an investigation. Mr. LeSage’s recommendation does not appear to address

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<sup>45</sup> Antonella Artuso “Police, SIU seek rules of engagement,” *The Toronto Sun* (8 April 2011) 30.

situations where the SIU has concluded its investigation and issued a press release, despite the fact that it was clearly Director Scott's post-investigation media communications that sparked concerns in police circles. Even if Mr. LeSage's recommendation was interpreted broadly to limit commentary after an investigation is complete, Director Scott's remarks have arguably all been directed at preserving the general integrity of SIU investigations.

- 152** Director Scott's press releases continue to come under close scrutiny by police officials. On July 25, 2011, OPP Commissioner Lewis wrote to Director Scott, criticizing the wording of a press release about a firearms injury. The Commissioner suggested that Director Scott's comment, "Even though the subject officer did not provide a statement, I am of the view that he had the lawful authority to use lethal force," could lead to the improper inference that there was something inappropriate about the subject officer not providing a statement. Director Scott responded on August 2, 2011, explaining that he believed that when the SIU does not lay a charge, the public has a right to know the reasoning process used to arrive at a decision. He explained that information received from a subject officer as well as the fact that no statement has been provided by a subject officer is very relevant to this process. He also advised that, based on a suggestion by a former OPP chief superintendent, his current practice in referring to such information is to include a phrase indicating that subject officers have the right not to provide statements to the SIU.
- 153** Rather than further abridge or debate the wording of information released by the SIU at the close of an investigation, I believe that the best approach would be to implement my original recommendation for public disclosure of the entire Director's report in cases where no charges are laid. This practice would expose the Director's reasoning behind not laying charges to full public scrutiny. Any concerns with protecting witness confidentiality could be addressed by selective redaction based on the risk of harm. Increased public reporting of SIU investigations would be in the interests of all involved, and would go a substantial way to building public confidence in SIU oversight.

## Oversight Undermined

- 154** In *Oversight Unseen*, I reflected on the evolution of the SIU and observed:

The history of police oversight in Ontario is marked by successive governments reacting reflexively, whenever public controversy erupts. Consequently, government interest in reforming the SIU has tended to be

short-lived and incomplete.... While acknowledging the value of independent criminal investigation of police, governments have sought solutions that reflect a middle ground, and have avoided adopting measures that could be seen as too threatening to the police community. Unfortunately, this approach has not eliminated problems regarding police co-operation, but tended to render them less visible.

- 155** I was particularly hopeful that the Ministry would follow through on its commitment to review the recommendations I made for the creation of a new legislative structure for the SIU, and would take decisive action towards clarifying and strengthening the SIU's authority for the long term. Unfortunately, while the Ministry did tackle some of my recommendations on the SIU's operations, it displayed no appetite for more comprehensive and enduring legislative change.
- 156** The Ministry has traditionally pursued a conciliatory approach to reform in the area of police oversight, despite the fact that this subject tends to be fiercely divisive and it is extremely challenging to find common ground. In contrast, my recommendations in *Oversight Unseen* did not represent a "consensus" amongst police, community and SIU stakeholders, but reflected my views on what was necessary to reinforce the SIU's effectiveness as well as enhance public confidence in the system of independent civilian review of police. As an unsolicited January 2009 submission lodged with the Ministry by the Ontario Association of Chiefs of Police attests, many of my recommendations in *Oversight Unseen* were not particularly popular with the policing community. In March 2009, the Ministry did hold separate confidential consultations to consider them. However, this process appears to have been largely pro forma. One meeting included representatives from the Ontario Association of Chiefs of Police, the Police Association of Ontario and the Ontario Association of Police Services Boards. Another meeting was held with a selection of community stakeholders. While the Ministry was reluctant to disclose the results of those sessions, from what I understand, police stakeholders generally saw no merit in my recommendations for legislative change.
- 157** After the March 2009 consultation sessions, the Ministry made no further attempts to seek input into possible legislative amendment, and I suspect the matter would have remained firmly on the shelf gathering dust, if not for intervening events. In fact, an internal minister's office briefing note dated March 30, 2009 suggests that the Ministry had no intention of pursuing legislative reform and was simply attempting to wait me out. The briefing note

refers to a draft letter reporting back to my Office on the Ministry's progress on implementing the recommendations from *Oversight Unseen* and advises:

With respect to the recommendations directed at the Government – i.e. the introduction of legislation to amend various provisions of the SIU's governing statute – MAG informs Mr. Marin that we have completed consultations with community and police stakeholders on how the government can best meet the objectives of the Report. We state that we are currently considering the results of the consultation.

As you know, the decision was made at the time of the Report's release that – largely due to vehement police opposition – we will not be considering the recommended legislative changes in the near term. As such, we have taken the interim step of collaborating with affected stakeholders.

At some point, we may have to communicate that we will not be legislating, however that time is not now.

Marin typically does not conduct any public communications regarding "report-backs" – he usually gets his media hit off report releases and then moves on. We need not be overly concerned that he will criticize us on the basis of this letter.

- 158** By October 2009, the SIU was once again squarely in the media crosshairs. Director Scott's press release relating to the shooting death of Levi Schaeffer, in which he criticized OPP note preparation practices, was followed by the Ontario Provincial Police Association's public repudiation of Director Scott's comments. The Toronto Police Association also stepped into the fray that month, alleging that the increased rate at which Director Scott had charged its members in 2009 reflected that he was out to fulfill a political agenda. The Association publicly proclaimed that it would be taking the unprecedented step of independently reviewing all cases where Toronto Police officers had been charged that year.

## The Annual Report that Wasn't

- 159** In November 2009, Director Scott provided the Ministry of the Attorney General with the SIU's Annual Report for the year ending March 31, 2009, which had been prepared at a cost of more than \$17,000. In that report,

Director Scott highlighted issues that affected the SIU's ability to operate independently and effectively. He wrote about the inconsistency in the definitions of "serious injuries" applied by various police services in the province. He also identified two other major roadblocks, the independence of police officers' notes, and the lack of a protocol with police agencies to address apparent breaches of the "duty to co-operate" provision of the *Police Services Act* and the associated regulations. In attempting to bring these issues into the public eye, Director Scott was acting consistently with the recommendations that I made in *Oversight Unseen*. However, rather than address the concerns with police co-operation publicly, the Ministry sat on the annual report and contacted Mr. LeSage in December 2009, with a view to engaging in a behind-the-scenes consensus-building exercise aimed at resolving the conflicts between the SIU and the policing community.

- 160** While the Ministry was intent on trying to resolve the disputes between the SIU and the policing community quietly, Director Scott tried to bring the discussion into the open. On a number of occasions, he encouraged the Ministry to make the consultation process with Mr. LeSage public and to involve community groups. The Ministry responded that that it preferred a "low key" and "discreet" approach. Over the next six months, Director Scott repeatedly requested permission from the Assistant Deputy Attorney General, Social Justice Programs and Policy Division (the Assistant DAG) to publish the 2008-2009 Annual Report, which represented a significant tool in the SIU's outreach strategy.<sup>46</sup> After numerous non-committal responses, in a teleconference on May 26, 2010, the Assistant DAG told Director Scott outright that he was not to release the report. When we interviewed this official, he acknowledged that directing an agency not to release an annual report was an unprecedented step. He denied that the Ministry had "suppressed" the annual report, but explained:

There were things that [Director Scott] wrote in the Annual Report that related to the extremely unfriendly dialogue with the Commissioner of the OPP and Chiefs of Police. And in the context of retaining LeSage and trying to get a level of discourse on track and resolve some of these

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<sup>46</sup> In a June 28, 2010 memo to Director Scott, the SIU Outreach Co-ordinator urged a review of the decision by the Ministry to withhold release of the 2008-2009 Annual Report. The memo was subsequently provided to the Ministry. The memo's author noted that the Annual Report is a significant tool in the SIU's outreach strategy and that, "Failing to release the 2008-2009 report limits our efforts towards transparency and accountability, and already skeptical individuals could interpret this as though the Unit has something to hide." With respect to the expended cost of the report, it was observed that, "In the wake of government spending being scrutinized and publicized, this also has the potential to catch media interest if there is no evidence of a report to attach to this budget line. Both the Unit and the Ministry will face harsh criticism."

problems, releasing an Annual Report that was seen as provocative didn't seem to be very useful.

- 161** Senior Ministry officials also withheld approval in the fall of 2009 for Director Scott to publish an article on police note-taking practices and the role of counsel.<sup>47</sup>
- 162** It wasn't until the first court decision in *Schaeffer* was released in June 2010 that the Ministry was prepared to mention publicly that it had asked Mr. LeSage to work with the SIU and police to improve communications and strengthen their professional working relationship.
- 163** It appears that most of the meetings held with Mr. LeSage as part of his review did not occur until late in 2010 and early 2011. While most of the meetings involved police stakeholders and SIU officials, Mr. LeSage did eventually have a meeting with community members of the SIU Director's Resource Committee. All these meetings were conducted on a confidential basis.
- 164** Mr. LeSage's review took more than 15 months. In the interim, the Ministry continued to review and analyze Director Scott's reports of SIU investigations. An internal Ministry briefing note dated February 4, 2010 – covering the period from January to December 2009 – advised that the Ministry had received 330 Director's reports and that 80, or roughly one in four, identified concerns about police conduct.
- 165** In *Oversight Unseen*, I recommended that the Ministry of the Attorney General actively raise issues of concern about police practices and policies with the Ministry of Community Safety and Correctional Services, which has overall responsibility for policing in this province:

**Recommendation 30**

**The Ministry of the Attorney General should bring issues of concern regarding police practices or issues affecting investigations identified by the Special Investigations Unit to the attention of the Ministry of Community Safety and Correctional Services and other Ministries as appropriate, and actively pursue resolution of such issues.**

- 166** The Ministry committed in September 2008 to implement this recommendation. However, it was not until 10 months later that it actually entered into a protocol with the Ministry of Community Safety and Correctional Services. In the July

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<sup>47</sup> *Supra* note 16.

2, 2009 agreement, the Ministry of the Attorney General undertook to notify the other Ministry of appropriate policy issues and issues of systemic concerns affecting SIU investigations. But even after the protocol was in place, the Ministry was reluctant to use it. Its February 4, 2010 briefing note suggested that any referral of issues to the Ministry of Community Safety and Correctional Services should await the conclusion of Mr. LeSage's discussions.

- 167** It wasn't until my follow-up investigation was well underway that the Ministry notified the Ministry of Community Safety and Correctional Services of the systemic concerns that had consistently arisen during SIU investigations. In a December 23, 2010 communication, the Ministry of the Attorney General advised the Ministry of Community Safety and Correctional Services under the protocol that these issues were: Late notification, failure of police officers to answer questions about whether or not counsel was consulted before officers' notes were prepared, the role of counsel, the same counsel representing multiple officers, and chiefs of police indicating that they would not respond to the SIU Director's requests.
- 168** Senior Ministry officials also discouraged Director Scott from publicly raising issues of concern with police co-operation in individual cases. After Director Scott issued his August 4, 2010 press release on the firearm injury sustained by Ryan Charles, in which he again criticized the involvement of police association counsel in the preparation of witness officer notes, the Assistant DAG personally contacted him to express dismay, observing that Director Scott had "relapsed."
- 169** On May 2, 2011, after the contentious issues were already out in the open as a result of Mr. LeSage's report, the Ministry provided Director Scott with the go-ahead to post both its 2008-2009 and 2009-2010 Annual Reports on its website.
- 170** While I was pleased that the results of Mr. LeSage's review were released publicly by the Ministry in April 2011, given my ongoing investigation, I was somewhat surprised that I only learned of this development at the same time as the general public. I understand that Director Scott similarly only received notice of the Ministry's press release on the morning it was issued.
- 171** Since *Oversight Unseen* was released, it appears that the Ministry of the Attorney General has systematically sought to discourage Director Scott from bringing significant issues relating to police co-operation into the public domain. Through suppression of the SIU's 2008-2009 Annual Report, the Ministry significantly undermined the SIU's ability to implement my recommendation calling on it to take rigorous action to ensure compliance with

its mandate, including publicizing incidents of non-co-operation. As the Ministry's lacklustre attempt at stakeholder consultation reveals, it also passively resisted implementation of my recommendations addressed at legislative reform of the SIU.

- 172** The pattern I observed in *Oversight Unseen* of government inertia in supporting the SIU's legislative authority has continued to the present day. Opposition by police interests continues to hold sway. The implementation of some of Mr. LeSage's recommendations is a welcome step forward. However, I believe that further legislative changes are still required to inject greater certainty, stability, and integrity into the SIU's oversight of police in Ontario.
- 173** The significance of the SIU's role in this province should not be underestimated. During the 2009-2010 fiscal year alone, the SIU investigated 287 incidents, including 33 deaths. Ontarians deserve an SIU with a clearly defined, effective mandate, applied consistently throughout the province. Increased transparency in the SIU process, including release of Director's reports as well as the results of parallel police investigations, would also enhance the accountability of the system and instill greater public confidence in policing.
- 174** Over a period of almost three years (October 18, 2008 to October 31, 2011), in 227 out of 658 cases formally investigated by the SIU, there were problems identified with police co-operation. The fact that police officials have failed to comply with the legislative and regulatory requirements in more than one-third of the SIU's investigations is deeply disturbing. Given the persistent failure on the part of police authorities to fully co-operate with the SIU, I believe that it is necessary for the province to make a genuine and sustained effort towards statutory reform. I am well aware that my recommendations are unpopular in policing circles. In an affidavit sworn by a senior Toronto Police Services official in support of a motion for the Ontario Association of Chiefs of Police to obtain intervener status in the *Schaeffer v. Ontario (Provincial Police)* appeal, it is suggested that constructive dialogue between OACP and the SIU ended after the release of *Oversight Unseen* and the appointment of Director Scott. OACP also made its opinion of that report quite clear to the Ministry. However, it is important to see beyond the views of powerful police stakeholders and consider the overriding public interest in accountability through civilian oversight. The time is long overdue for the SIU to have its own constituting legislation providing it with the authority it requires to operate independently and effectively. I again call on the government of Ontario to implement my recommendations for legislative reform, and for the Ministry to take all necessary steps towards making this a reality.

## Conclusion

**175** It is my opinion, in accordance with s. 21(1)(b) of the *Ombudsman Act*, that the Ministry of the Attorney General's conduct, in failing to properly support the SIU in its efforts to implement my recommendation relating to pursuing incidents of non-compliance with its authority, and in neglecting to take sufficient and timely steps towards implementing my recommendation relating to apprising the Ministry of Community Safety and Correctional Services of relevant issues and addressing the recommendations I made to the government of Ontario for legislative reform, is unreasonable.

## **Recommendations**

Accordingly, I am making the following recommendations:

### **Ministry of the Attorney General**

#### **Recommendation 1**

The Ministry of the Attorney General should support the Special Investigations Unit in its efforts to implement the recommendations in *Oversight Unseen*, specifically Recommendation 3, relating to taking rigorous action to ensure compliance with legislative and regulatory requirements.

Subsection 21(3)(g) *Ombudsman Act*

#### **Recommendation 2**

The Ministry of the Attorney General should take all necessary steps to expeditiously promote adoption of the recommendations for legislative reform addressed to the Government of Ontario, which are set out below.

Subsection 21(3)(g) *Ombudsman Act*

#### **Recommendation 3**

The Ministry of the Attorney General should report back to my Office in six months' time on the progress in implementing my recommendations, and at six-month intervals thereafter until such time as I am satisfied that adequate steps have been taken to address them.

Subsection 21(3)(g) *Ombudsman Act*

### **Government of Ontario**

These recommendations also appear in *Oversight Unseen*, although they have been amended to reflect intervening changes. The corresponding recommendation number from that report appears beside the new recommendation number.

#### **New Legislative Structure**

##### **Recommendation 4 [previously 32]**

The Special Investigations Unit should be reconstituted under new legislation dealing specifically with its mandate and investigative authority.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 5 [previously 33]**

The Special Investigations Unit's mandate should be clearly outlined in its constituting legislation. Consistent with Mr. LeSage's recommendation, the Osler definition should be codified under the new legislation. The legislation should also specify that the Special Investigations Unit has the sole responsibility for assessing the criminality of incidents involving death or serious injuries to individuals as a result of contact with police. The Special Investigation Unit's authority to investigate incidents involving serious injury or death of police officers, as well as historical incidents where subject officers have retired should also be expressly set out in its constituting legislation.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 6 [previously 34]**

When the Ministry of the Attorney General conducts a review relating to the Special Investigations Unit in April 2013, it should consider including a definition of serious injury in its constituting legislation that encompasses significant psychological injury, all gunshot wounds and serious soft tissue injuries.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 7 [previously 35]**

The legislative requirement that police co-operate with the Special Investigations Unit should include a specific definition of police notes, and an obligation on police to disclose relevant personnel records, and police policies. The legislation should also reflect Mr. LeSage's recommendation (now incorporated into the *Police Services Act* regulations) that police notes be completed by the end of the officer's tour of duty, except where excused by the chief of police or commissioner of the Ontario Provincial Police. The circumstances where extension of the time for completing notes is permissible should be defined, e.g. upon confirmation by a health practitioner that the officer is not fit to complete the notes as required.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 8 [previously 36]**

The Director of the Special Investigations Unit should have the discretion to not lay criminal charges on public interest grounds, but should be required to make such decisions and the reasoning behind them public. The Director should have the discretion to refer such cases directly to the Ontario Civilian Police Commission for consideration under the disciplinary process.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 9 [previously 37]**

The Director of the Special Investigations Unit should have the discretion to refer incidents of police breach of legislative and regulatory requirements relating to co-operation with the Unit's investigations directly to the Ontario Civilian Police Commission for consideration under the discipline process.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 10 [previously 38]**

Police failure to co-operate with or obstruction of the Special Investigations Unit should be made an offence punishable by fine or imprisonment consistent with similar provincial offences.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 11 [previously 39]**

The Special Investigations Unit should be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge, subject to the Director's discretion to withhold information on the basis that disclosure would involve a serious risk of harm.

Subsections 21(3)(e), 21(3)(g) *Ombudsman Act*

**Recommendation 12 [previously 40]**

There should be legislative provision for the Director to be appointed on a five-year renewable term, with compensation established on an objective basis and not dependent on performance.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 13 [previously 41]**

There should be legislative provision for the appointment of a Deputy Director of the Special Investigations Unit through order-in-council. Section 113 of the *Police Services Act* was amended to reflect this recommendation on December 15, 2009, to provide for the appointment of an acting director pursuant to the *Good Government Act, 2009*, S.O. 2009, c. 33, Sched. 2, s. 60(3). This amendment should be carried over into the proposed new legislation.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 14 [previously 42]**

There should be a legislative prohibition against legal counsel representing police officers involved in the same incident under investigation by the Special Investigations Unit to ensure that the integrity of its investigations is maintained. Alternatively, consistent with Mr. LeSage's recommendations (as now incorporated under the *Police Services Act* regulations), the legislation should provide that witness officers are not to be represented by the same legal counsel

as subject officers, and confirm that officers must not have direct or indirect communication pending the completion of Special Investigation Unit interviews. In addition, consistent with the Court of Appeal decision in *Schaeffer* the legislation should require officers to complete their notes without consulting anyone, including legal counsel, about their substance. Consideration should also be given to the Ministry of Community Safety and Correctional Services issuing a provincewide directive on note preparation, clarifying that all police notes are to be prepared independently and without consulting anyone, including legal counsel regarding their content.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 15 [previously 43]**

Civilian members of the Ontario Provincial Police should be subject to the requirement to co-operate with Special Investigations Unit investigations. The definition of “member of a police force” in section 2 of the *Police Services Act* was amended June 5, 2009, in response to this recommendation pursuant to the *Budget Measures Act, 2009*, S.O. 2009, c. 18, Schedule 23, s. 14. This amendment should be carried forward in the proposed new legislation.

Subsection 21(3)(g) *Ombudsman Act*

**Recommendation 16 [previously 44]**

The legislation should provide for public release of internal police investigative reports related to Special Investigations Unit investigations, in cases where no charges are laid, subject to the discretion to withhold information on the basis that disclosure would involve a serious risk of harm. Where charges against officers are pending as a result of internal investigations, the fact that charges have been laid should be publicized, as well as the eventual outcome.

Subsection 21(3)(g) *Ombudsman Act*

## **Responses**

- 175 The Ministry of the Attorney General, the Ministry of Community Safety and Correctional Services and the Special Investigations Unit were all given an opportunity to respond to my preliminary findings, conclusion and recommendations.
- 176 On June 6, 2011, the Special Investigations Unit responded by providing additional information and further documents relating to the issues canvassed in my investigation. The Special Investigations Unit’s comments have been incorporated into this report.

- 177** The Ministry of Community Safety and Correctional Services wrote on June 8, 2011, thanking me for the opportunity to review my preliminary report. It did not make any substantive comments. A copy of its response is included as Appendix B to this report.
- 178** The Ministry of the Attorney General also responded on June 8, 2011. The Ministry advised that it remains committed to ensuring a system of oversight that is effective, independent and has the confidence of the public it serves. While the Ministry stated that it appreciated the recommendations that I put forward in both my reports, it did not address any of the specific recommendations resulting from my latest investigation. It reviewed some of the steps that it had taken to satisfy my earlier recommendations from *Oversight Unseen*<sup>48</sup> and then went on to refer to the consultation process it had briefly engaged in, as well as Mr. LeSage's review and recommendations. The Ministry expressed the belief that implementing Mr. LeSage's recommendations as soon as possible was an "important and appropriate first step to help strengthen the professional working relationship that is essential to a well-functioning system that best serves the public." It also repeated its commitment to undertake a further review of the SIU and police relations within the next two years. A copy of the Ministry's response is included as Appendix C to this report.
- 179** On June 23, 2011, the Attorney General wrote to advise me that on August 1, 2011, a new amending regulation would come into force, implementing three of Mr. LeSage's recommendations.
- 180** As I have noted throughout this report, I welcome Mr. LeSage's recommendations and the regulatory changes that have been introduced. However, I remain firmly convinced that additional legislative reform is required to ensure that the SIU has the full authority it needs to investigate incidents within its mandate independently and thoroughly. More than 20 years after it was created, the SIU continues to be thwarted in its efforts, as a result of strong and pervasive police resistance.
- 181** It is telling that the Ministry of the Attorney General did not even deign to address my specific recommendations, but chose to defer to Mr. LeSage's

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<sup>48</sup> One of the steps highlighted by the Ministry in its response was the additional funding the SIU received to assist in hiring and retaining qualified civilian investigators. We recently learned that hiring restraints imposed across the Ontario Public Service resulted in the SIU having to forgo filling an investigator trainee position for at least fiscal 2010-2011.

review. Once again, I am left with the indelible impression that the Ministry is loath to consider any reform measures that would prove too distasteful to the policing community. The Ministry is content to adopt partial solutions and ride out the media storms when they hit.

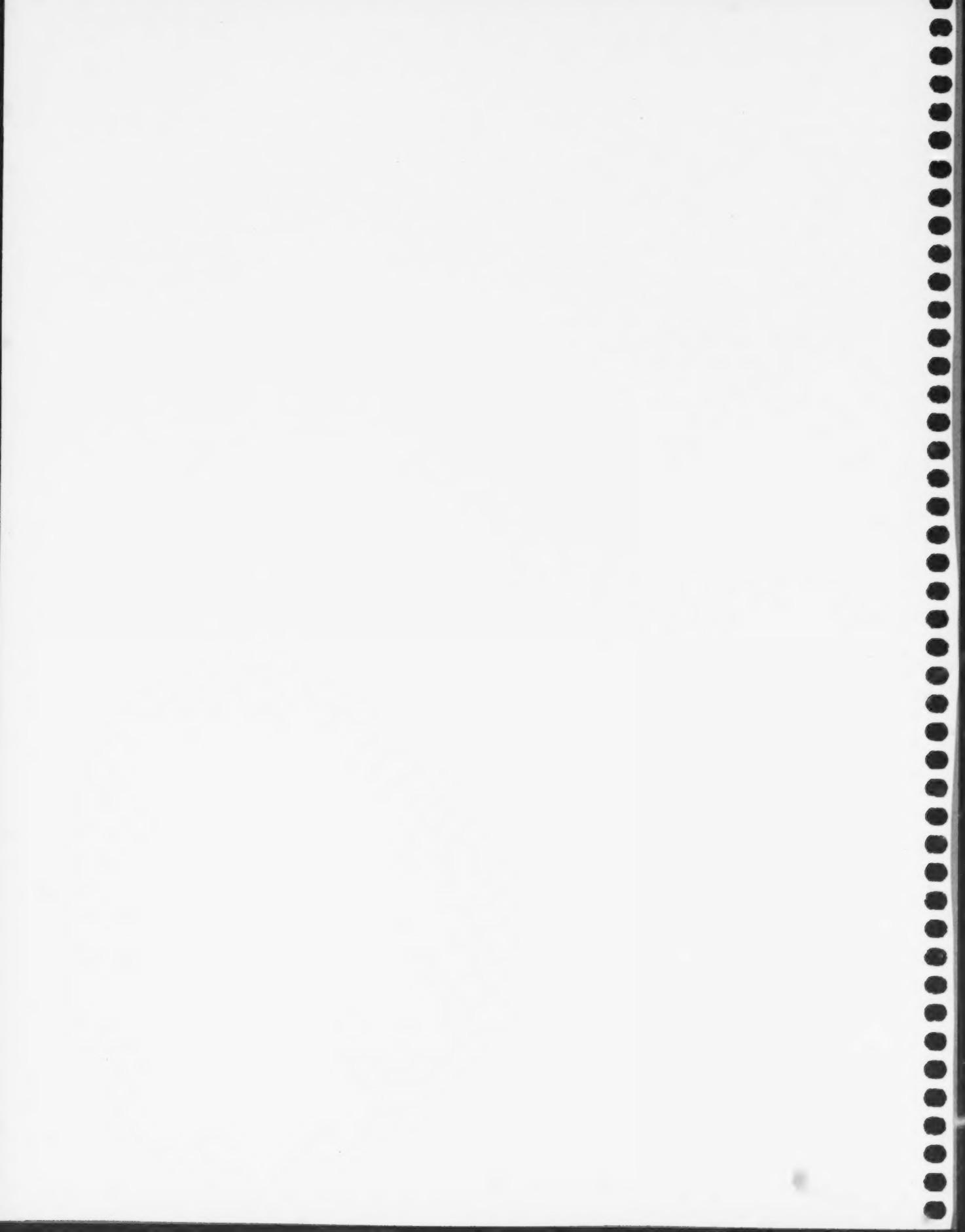
- 182** The Ministry's silence with respect to my specific recommendations is telling. The Ministry's dismissive attitude towards the oversight of my Office is consistent with its efforts to undermine the SIU's attempts to carry out my previous recommendations. Unfortunately, it is the citizens of Ontario who are the losers in this equation. The Ministry's stance continues to frustrate the promise of strong and independent civilian police oversight and serves to further undermine public confidence in policing.



André Marin  
Ombudsman of Ontario



**Appendix A:**  
**Report Regarding SIU Issues,**  
**by Patrick J. LeSage, Q.C.,**  
**Gowling Lafleur Henderson LLP**





montréal · ottawa · toronto · hamilton · waterloo region · calgary · vancouver · moscow · london

The Hon. Patrick J. LeSage, CM, OOnt, QC  
Direct 416-862-3569  
[Patrick.lesage@gowlings.com](mailto:Patrick.lesage@gowlings.com)

April 4, 2011

The Honourable Chris Bentley  
Attorney General of Ontario  
Ministry of the Attorney General  
McMurtry-Scott Building  
720 Bay Street, 11th Floor  
Toronto, Ontario  
M7A 2S9

Dear Mr. Attorney:

Re: SIU Issues

Enclosed is my report regarding some SIU issues.

Sincerely,

Patrick J. LeSage, Q.C.

PJL:sn

Encl.

## Report regarding SIU Issues

I was asked to review some issues that have arisen over the last few years in matters involving the Special Investigations Unit and the police and provide some recommendations.

In developing these recommendations I am mindful of the vital importance of each participant in the system of civilian oversight of police conduct: the Director and the investigators, the police, the lawyers and the public. It is critical that all maintain solid operational relationships if these important public institutions are to maintain continued public confidence.

The relationship between the various participants in this process is inherently challenging. Nevertheless it is important they each continue to work to improve their relations. The following recommendations I hope will be the beginning of this process of moving forward in a cooperative spirit.

These recommendations will, I believe, help clarify some of the roles and responsibilities of the participants in this process.

I recommend that within 2 years there be a review of these, and other SIU/Police related issues.

### **Definition of "Serious Injuries"**

Section 113.(5) of the *Police Services Act*, R.S.O. 1990, c.P.15 limits the SIU to investigations "into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers."

I recommend that the definition of "serious injuries" referred to as the "Osler definition" be codified through legislation as follows:

"Serious injuries" shall include those that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault.

# gowlings

"Serious injury" shall initially be presumed when the victim is admitted to hospital, suffers a fracture to a limb, rib or vertebrae or to the skull, suffers burns to a major portion of the body or loses any portion of the body or suffers loss of vision or hearing, or alleges sexual assault. Where a prolonged delay is likely before the seriousness of the injury can be assessed, the Unit should be notified so that it can monitor the situation and decide on the extent of its involvement.

## **Right to Counsel**

Section 7 of O. Reg. 267/10 is clear. All officers have the right to counsel.

My recommendation is that Regulation 267/10 be amended to provide as follows:

S.7.(1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.

- (i) Witness officers may not be represented by the same legal counsel as subject officers.

## **Officer's Notes**

I recommend that section 9 of O. Reg. 267/10 be amended to add the following subsection:

9.(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.

I also recommend that section 6 of O. Reg. 267/10 be amended to read as follows:

6.(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

In addition, it is my recommendation that steps be taken to request the Law Society of Upper Canada add the following clarification to the Commentaries to the Rules of Professional Conduct:

Lawyers representing more than one officer in an investigation by the Special Investigations Unit are reminded of their duty not to undermine section 6 of O. Reg 267/10 (Segregation of Officers) by disclosing to one police officer involved in the incident anything said to the lawyer by the other officer regarding his or her involvement in the incident.

### **Attorney General Directive**

I recommend that the Attorney General make clear to Crowns that the 23 December, 1998 Directive (the “Harnick Directive”) was, and is, intended to apply not only to an officer originally designated as a ‘subject officer’ but also to an officer originally designated a “witness officer” but subsequently becomes a ‘subject officer’.

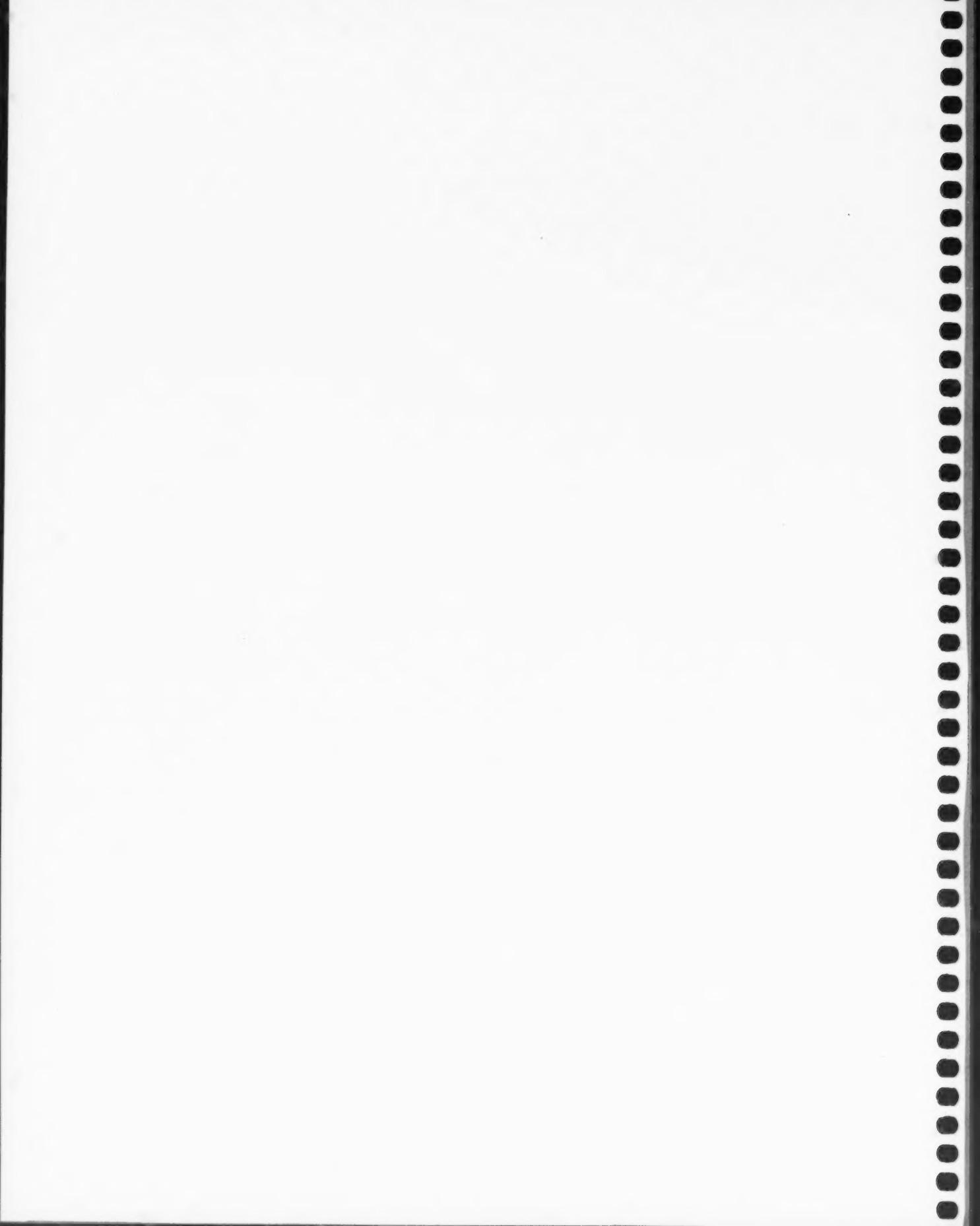
### **Report of Investigation by Chief of Police**

Section 11 of O. Reg 267/10 is clear. The chief of police shall investigate any incident for which the SIU has been notified. The chief of police of a municipal police force reports his or her findings to the Police Services Board. The OPP Commissioner is obliged to prepare a report of his or her findings and any action taken. The SIU director’s authority does not extend to requiring the chief of police or OPP commissioner to investigate or report to him and should not be part of the SIU director’s communication with the chief of police or OPP commissioner.

### **Press Release/ Public Statement**

I recommend that the SIU director ensure its press release and /or public statement be confined solely to issues required to preserve the integrity of the investigation as proscribed by section 13 of O. Reg. 267/10.

**Appendix B:**  
**Letter from the Ministry of Community Safety**  
**and Correctional Services, June 8, 2011**



**Ministry of Community Safety  
and Correctional Services**

**Office of the Deputy Minister  
Community Safety**

**25 Grosvenor Street  
11<sup>th</sup> Floor  
Toronto ON M7A 1Y6  
Tel: 416-326-5060  
Fax 416-327-0469**

**Ministère de la Sécurité communautaire et  
des Services correctionnels**

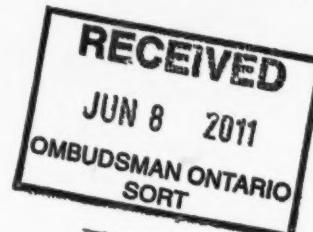
**Bureau du-sous-ministre  
Sécurité communautaire**

**25, rue Grosvenor  
11<sup>e</sup> étage  
Toronto ON M7A 1Y6  
Tél. : 416-326-5060  
Téléc. : 416-327-0469**



**June 8, 2011**

**Mr. Andre Marin  
Ombudsman  
Ombudsman Ontario  
Bell Trinity Square  
483 Bay Street, 10<sup>th</sup> Floor, South Tower  
Toronto, ON M5G 2C9**



**Dear Mr. Marin,**

**Please find enclosed a copy of your Preliminary Report of the investigation into the Ministry of the Attorney General's implementation of recommendations concerning reform of the Special Investigations Unit, further to your correspondence to me dated May 26, 2011.**

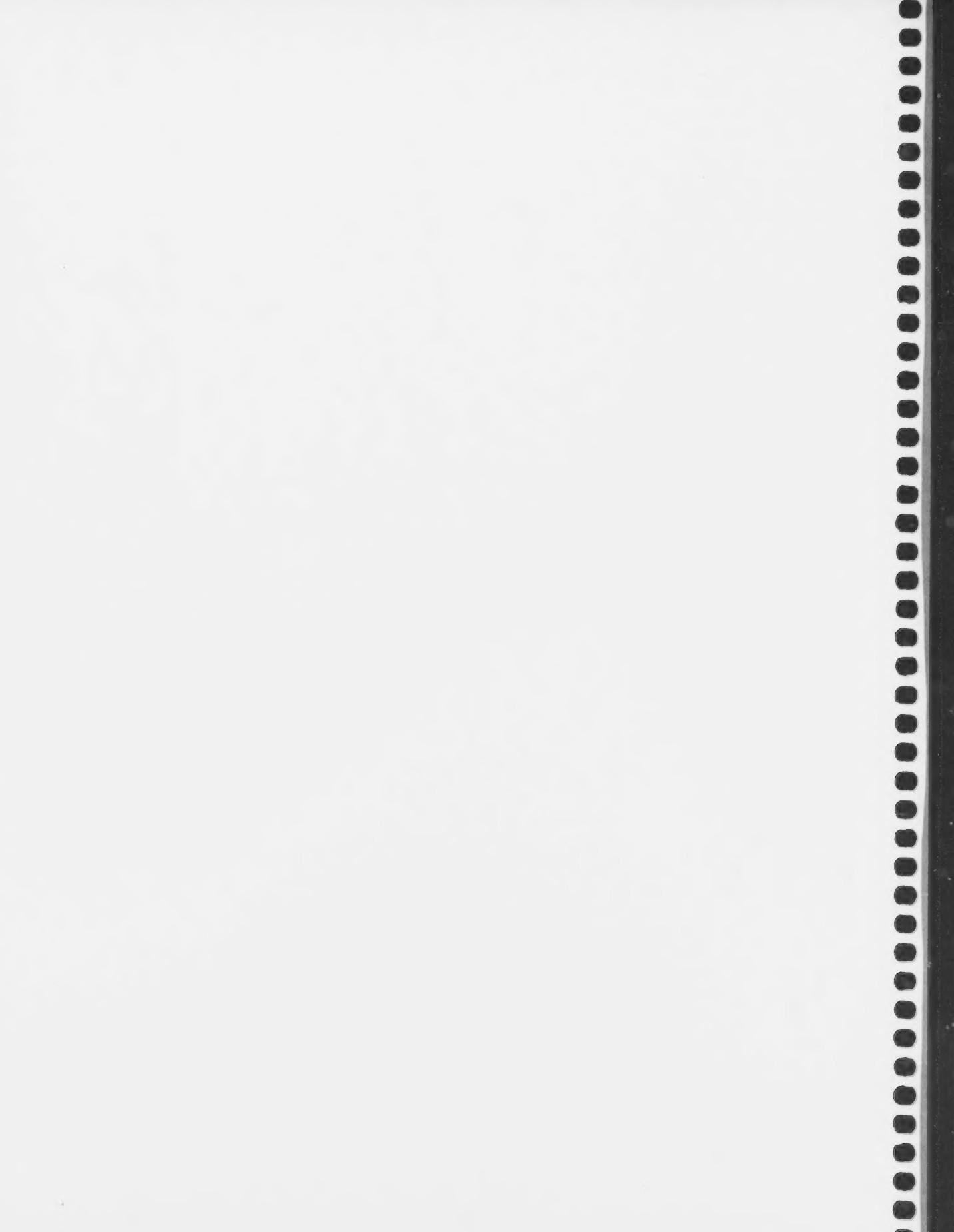
**I would like to take this opportunity to thank you for providing me with the Preliminary Report to review, in advance of the release of the Final Report.**

**Sincerely,**

**Ian Davidson  
Deputy Minister, Community Safety**



**Appendix C:**  
**Letter from the Ministry of the Attorney**  
**General,**  
**June 8, 2011**



**Ministry of the  
Attorney General**

**Ministère du  
Procureur général**

Office of the  
Deputy Attorney General

Cabinet du  
Sous-procureur général

McMurtry-Scott Building  
720 Bay Street  
11th Floor  
Toronto ON M7A 2S9

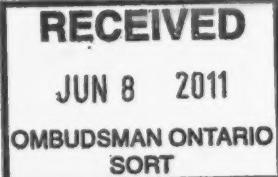
Édifice McMurtry-Scott  
720, rue Bay  
11<sup>e</sup> étage  
Toronto ON M7A 2S9

Tel: 416-326-2640  
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Tél.: 416-326-2640  
Téléc.: 416-326-4018

June 8, 2011

Mr. André Marin  
Ombudsman of Ontario  
Bell Trinity Square  
483 Bay Street, 10<sup>th</sup> floor, South Tower  
Toronto, ON  
M5G 2C9



Dear Mr. Marin:

**Re: Investigation into the Special Investigation Unit's operational effectiveness and credibility – Draft Follow-up Report**

Thank you for the opportunity to review the draft follow-up report on the operational effectiveness and credibility of the Special Investigations Unit (SIU). The Ministry of the Attorney General remains committed to ensuring a system of oversight that is effective, fair, independent, and has the confidence of the public it serves. The Ministry appreciates the recommendations that have been put forward in your initial and subsequent reports. Please accept this letter with the Ministry's responses.

As reported to you previously, the Ministry has moved forward to address each of the recommendations in your initial report. This includes:

- Providing one-time funding for a Mobile Investigate Centre that will allow SIU investigators to establish an independent presence at the scene of major incidents, and conduct instant, thorough, secure and video-taped interviews with witnesses (Recommendation 27);
- Providing an additional \$700,000 to fund eight new SIU staff, including civilian investigators and community outreach staff (Recommendation 28);
- Supporting and working with Information Technology partners and the SIU in developing a case management system (Recommendation 26);
- Amending the Memorandum of Understanding to clarify the accountability and independence of the Director of the SIU (Recommendation 29);
- Working with Ministry of Community Safety and Correctional Services to develop a protocol to bring issues of concern identified by the SIU to its attention (Recommendation 30);

- Providing for the appointment of the new SIU Director to a five-year term (Recommendation 40);
- Amending section 113 of the *Police Services Act* to provide for the appointment of a Deputy Director of the SIU (Recommendation 41);
- Amending the definition of "member of a police force" in s. 2 of the *Police Services Act* to respond to the recommendation that civilian members of the Ontario Provincial Police should be subject to the requirement to co-operate with SIU investigations (Recommendation 43);
- Consulting with the Law Society of Upper Canada regarding whether there should be a legislative prohibition against legal counsel representing more than one police officer involved in the same incident under investigation by the SIU (Recommendation 42);
- Consulting with the Ministry of Transportation regarding whether the SIU should have emergency vehicle status under the *Highway Traffic Act* (Recommendation 45).

Following your report in 2008, the Ministry also began consultation on your recommendations involving legislative and regulatory initiatives. Those consultations involved reaching out to the public and police stakeholders for feedback and suggestions on implementation. While the Ministry received the specific comments from each group on a confidential basis, in summary, it became clear that there was strong disagreement amongst those consulted on the appropriate way to proceed with certain initiatives. At the same time, it also became clear that the professional working relationship between the police and SIU had deteriorated. All of the Ministry's efforts have been dedicated to supporting and improving this professional working relationship.

The Ministry is mindful of the vital importance of each of the participants in our system of police oversight: the Director and the investigators, the police, the lawyers and the public. Both the SIU and police perform difficult and valuable jobs. Tensions are inherent in any system of police oversight. This is no less the case in Ontario, where the province has led the way in developing a fully independent system of civilian oversight. However, as with any institution of fundamental importance, the challenges must be addressed and overcome on an ongoing basis. Serious issues and concerns have been identified, and the Ministry has been committed to finding fair, effective, and sustainable solutions.

In order to continue moving forward, the Attorney General retained the Honourable Patrick LeSage, a highly regarded former Chief Justice of the Superior Court, in December 2009. Mr. LeSage was asked to meet with the SIU and police and find ways to help strengthen their professional working relationship as a first step to ensuring an effective system of oversight. In October 2010, Mr. LeSage advised the Attorney General that specific operational issues were functioning as barriers to an effective working relationship. In many cases, these issues had been around for many years, but had not been addressed effectively. The Attorney subsequently asked Mr. LeSage to provide his best advice on the specific operational issues he identified. Mr. LeSage provided his report to the Attorney in April 2011, including specific recommendations for legislative and regulatory change. The Attorney has publicly committed to moving forward on all of these recommendations at the earliest opportunity.

As you state in your report, the subject of police oversight is a "fiercely divisive" one. In his report, Mr. LeSage also notes that "the relationship between the various participants in this process is inherently challenging. Nevertheless it is important that they each continue to work to improve their relations. The following recommendations I hope will be the beginning of this process of moving forward in a cooperative spirit."

The Ministry believes that implementing Mr. LeSage's recommendations as soon as possible is an important and appropriate first step to help strengthen the professional working relationship that is essential to a well-functioning system that best serves the public. As recommended by Mr. LeSage, to ensure that progress continues forward as intended, the Attorney has committed to undertake a review of these and other SIU/police related issues - including important opportunities for legislative reform - within the next two years. This will ensure that we build upon and strengthen the various initiatives that have been taken over the years to develop our strong system of police oversight.

We are returning the copy of the draft report to you, as well as a list of the names of individuals at the Ministry who have reviewed the draft report.

Thank you again for the opportunity to review your draft report and for your commitment to improving civilian oversight of police in Ontario.

Yours sincerely,



Murray Segal  
Deputy Attorney General

Encl. Draft Report and List of Names

- c: The Hon. Chris Bentley, Attorney General  
Mr. Ian Scott, Director, Special Investigations Unit  
Mr. Mark Leach, Assistant Deputy Attorney General, Social Justice Programs & Policy Division



